DOCKET

No. 13-1496

Title:	Dollar General Corporation, et al., Petitioners v. Mississippi Band of Choctaw Indians, et al.
Docketed:	June 18, 2014
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-60668)
Decision Date:	March 14, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Jun 12 2014	Petition for a writ of certiorari filed. (Response due July 18, 2014)
Jul 8 2014	Order extending time to file response to petition to and including August 22, 2014, for all respondents.
Jul 18 2014	Brief amicus curiae of South Dakota Bankers Association filed.
Aug 21 2014	Brief of respondents Mississippi Band of Choctaw Indians, et al. in opposition filed.
Sep 2 2014	Reply of petitioners Dollar General Corporation, et al. filed.
Sep 4 2014	Supplemental brief of respondents Mississippi Band of Choctaw Indians, et al. filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 12 2015	Brief amicus curiae of United States filed.
May 19 2015	DISTRIBUTED for Conference of June 4, 2015.
May 19 2015	Supplemental brief of petitioners Dollar General Corporation, et al. filed. (Distributed)
Jun 8 2015	DISTRIBUTED for Conference of June 11, 2015.
Jun 15 2015	Petition GRANTED.
Jul 10 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 14, 2015.
Jul 10 2015	The time to file respondents' brief on the merits is extended to and including September 28, 2015.
Jul 29 2015	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including August 31, 2015.
Jul 29 2015	The time to file respondents' brief on the merits is further extended to and including October 15, 2015.
Aug 7 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 10 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 31 2015	Joint appendix filed. (Statement of costs filed.)
Aug 31 2015	Brief of petitioners Dollar General Corporation, et al. filed.

Sep 4 2015	Brief amicus curiae of South Dakota Bankers Association filed.
Sep 4 2015	Brief amici curiae of Oklahoma, et al. filed.
Sep 8 2015	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Sep 8 2015	Brief amicus curiae of Association of American Railroads filed.
Oct 9 2015	SET FOR ARGUMENT on Monday, December 7, 2015
Oct 15 2015	Brief of respondents Mississippi Band of Choctaw Indians, et al. filed.
Oct 19 2015	Record requested from U.S.C.A. 5th Circuit.
Oct 21 2015	Brief amici curiae of American Civil Liberties Union and the ACLU of Mississippi filed.
Oct 22 2015	Brief amici curiae of Puyallup Tribe of Indians, et al. filed.
Oct 22 2015	Brief amici curiae of National Congress of American Indians, et al. filed.
Oct 22 2015	Brief amicus curiae of United States filed.
Oct 22 2015	Brief amici curiae of Historians and Legal Scholars Gregory Ablavsky, et al. filed.
Oct 22 2015	Brief amici curiae of The Cherokee Nation, et al. filed.
Oct 22 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 22 2015	Brief amici curiae of National Indigenous Women's Resource Center, et al. filed.
Oct 22 2015	Brief amici curiae of Mississippi, et al. filed. (Distributed)
Oct 27 2015	CIRCULATED
Nov 9 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 16 2015	Reply of petitioners Dollar General Corporation, et al. filed. (Distributed)
Dec 7 2015	Argued. For petitioners: Thomas C. Goldstein, Bethesda, Md. For respondents: Neal K.Katyal, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

13-1496

No. 13-___

Supreme Court, U.S.
FILED
JUN 12 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court held that generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court recognized as an exception to that rule that a "tribe may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id.* (emphasis added).

The Court subsequently recognized in *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that it has "never held that a tribal court had jurisdiction over a nonmember defendant" in any context, so that it remains an "open question" whether tribal courts may ever exercise civil jurisdiction over nonmembers. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), this Court granted certiorari to decide whether *Montana*'s undefined "other means" include adjudicating civil tort claims in tribal court. However, the Court resolved the case on other grounds.

In this case, a divided panel of the Fifth Circuit held that tribal courts do have that jurisdiction. Five judges dissented from the denial of rehearing en banc. The case accordingly presents the issue the Court left open in *Hicks* and the Question the Court granted certiorari to decide in *Plains Commerce*:

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that Dollar General Corporation has no parent company and no publicly traded company owns 10% or more of its stock. Dolgencorp, LLC is a wholly owned subsidiary of Dollar General Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dollar General Corporation and Dolgencorp, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1-36) is published at 746 F.3d 167. The dissent from denial of rehearing en banc (Pet. App. 92-94) is published at 746 F.3d 588. The district court's opinion (Pet. App. 39-54) is published at 846 F. Supp. 2d. 646. A prior decision of the district court denying temporary injunctive relief (Pet. App. 55-74) is unpublished.

The opinion of the Supreme Court of the Mississippi Band of Choctaw Indians (Pet. App. 75-91) is unpublished. The Order of the District Court of the Mississippi Band of Choctaw Indians was oral and not transcribed.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2014. Pet. App. 1. The court of appeals denied petitioners' timely petitions for rehearing en banc on March 14, 2014. Pet. App. 92. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no relevant constitutional or statutory provisions in this case.

STATEMENT OF THE CASE

Respondent Doe is a member of an Indian tribe who participated in a short internship in a store operated by petitioner Dolgencorp, LLC, a non-Indian corporation. Alleging that he had been sexually assaulted by his supervisor, Doe's family sued petitioners in tribal court on the basis of vicarious liability and/or negligence in hiring or supervising the alleged perpetrator. The Does asked the tribal court to order petitioners to pay in excess of $2.5 million in compensatory and punitive damages. The Fifth Circuit upheld the jurisdiction of the tribal court by a divided vote. Five judges dissented from the denial of rehearing en banc.

I. Legal Background

Unlike other sovereigns, such as states, Indian tribes do not have the inherent blanket authority to regulate all conduct occurring within their boundaries. Instead, this Court has long held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981); *see also, e.g.*, *id.* at 565 ("[T]he Indian tribes have lost any right of governing every person within their limits

except themselves." (citation and internal quotation marks omitted)).

Applying that principle requires distinguishing between the power of tribes over members (which is clearly bound up with the right of "self-government" and the power "to control internal relations"), *Montana*, 450 U.S. at 564, and their power over nonmembers. The Court's cases draw a further distinction between a tribe's *legislative* power to proscribe rules for nonmember conduct on tribal land and tribes' *adjudicative* authority to enforce those rules against nonmembers in tribal court.

A. The Scope Of Tribes' Legislative Authority

As a general matter, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565; *see also, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), for example, this Court held that tribes may not apply their criminal laws to nonmembers absent express authorization from Congress. "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Duro v. Reina*, 495 U.S. 676, 693 (1990).

For similar reasons, the Court also has generally prohibited tribes from exercising *civil* jurisdiction over nonmembers. "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (footnote omitted). The Court in *Montana* established two limited exceptions to that general rule:

First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565.

Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. This second exception permits tribes to regulate nonmember activities in the absence of consent only when the conduct "imperil[s] the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation marks and citation omitted).

B. The Scope Of Tribes' Adjudicative Jurisdiction

The *Montana* exceptions describe the scope of a tribe's legislative or regulatory authority – that is,

the power to levy taxes or issue rules governing nonmember conduct on a reservation. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). This Court has recognized that whether tribes may enforce those rules against nonmembers in tribal courts is another question. *Id.* at 357-58.

The Court has made a point of noting that it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358 n.2. The Court thus held in *Oliphant* that tribal courts may not enforce *any* tribal law through criminal proceedings in a tribal court, absent congressional authorization. 435 U.S. at 212. And the Court has repeatedly left open whether, or under what circumstances, a tribal court may exercise *civil* jurisdiction over nonmembers. *See, e.g.*, *Hicks*, 533 U.S. at 358 n.2.

II. Factual And Procedural Background

A. Factual Background

Petitioner Dolgencorp, LLC operates a retail store selling basic household merchandise and consumable goods at the Town Center on the reservation of the Mississippi Band of Choctaw Indians. Pet. App. 2. It leases the store space from the Tribe. *Id.* In 2003, Dale Townsend was employed as the Store Manager. *Id.*

The Tribe operates a job training program known as the Youth Opportunity Program (YOP) to place young tribal members in short-term positions with local businesses for educational purposes. Pet. App. 2-3. The Program had no impact on either the Tribe's governance or internal relations. *Id.* 16. Businesses participating in the program benefited by receiving

up to six weeks of temporary labor by the youth paid for by the Tribe. *Id.* 5. In the spring of 2003, Townsend agreed to Dollar General's participation in the program. *Id.* 2.

Respondent John Doe is a member of the Mississippi Band of Choctaw Indians and was a participant in the YOP. Pet. App. 3. The YOP assigned Doe to the Dollar General store. *Id.* Doe alleges that in July 2003, during his assignment at the store, Townsend sexually molested him. *Id.*

B. Proceedings In The Tribal Court

Although Doe could have brought claims in state court,[1] his family chose instead to pursue litigation in the courts of his tribe. In January 2005, the Does sued Townsend and petitioners, alleging that petitioners were vicariously liable for Townsend's criminal conduct, or were negligent in his hiring, training, and supervision. Pet. App. 3. The Does asked the tribal court to order petitioners to pay "actual and punitive damages in a sum not less than 2.5 million dollars." *Id.*

The defendants moved to dismiss on the grounds that the tribal court lacked jurisdiction. Pet. App. 3. The tribal district court denied the motions. *Id.* In August 2005, the defendants filed a Petition for Permission to Appeal with the Supreme Court of the Choctaw Tribal Court. *Id.* On February 8, 2008, the Choctaw Supreme Court allowed the appeals and in

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[1] *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

the same order affirmed the exercise of jurisdiction. *Id.*

C. Proceedings In The District Court

On March 10, 2008, petitioners and Townsend filed suit in the District Court for the Southern District of Mississippi seeking to enjoin the litigation in tribal court. Pet. App. 4.[2] The district court granted summary judgment in respondents' favor in relevant part. *Id.* 37-38. The court recognized that under "*Montana*, and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians." *Id.* 42. But relying on the first *Montana* exception, the court held that by agreeing to provide a position for Doe at its store, petitioners "implicitly consented to the jurisdiction of the Tribe with respects to matters connected to this relationship." *Id.* 46. At the same time, the court held that the tribal courts had no jurisdiction over Townsend, the actual alleged perpetrator, because in the court's view he did not have a sufficient consensual relationship with Doe or the Tribe. *Id.* 71-73.

D. Court of Appeals Ruling

1. A divided panel of the Fifth Circuit affirmed. Pet. App. 1.

a. The panel began by rejecting any suggestion that *Montana*'s first exception did not authorization

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[2] Federal courts may consider collateral challenges to tribal court proceedings and enjoin litigation over which the tribal court lacks jurisdiction. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985).

regulation by tort litigation in tribal court. While acknowledging the dissent's assertion that "no circuit court has upheld Indian-court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant," Pet. App. 11 n.3, the panel majority held that a "tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework," *id.* 10. The panel then held that by agreeing to take on Doe as an intern, petitioners engaged in a "consensual relationship" with a tribe or tribe member within the meaning of the first *Montana* exception. *Id.* 12.[3]

The panel further held that because of that consensual relationship, petitioners were subject to tribal court jurisdiction for tort claims for harm Doe suffered "in the course of his employment." Pet. App. 13-14. The panel held that the tribe had *legislative* authority over the conditions of employment in petitioners' stores, concluding that the tribe could legitimately "regulate the safety of [Doe's] workplace." *Id.* 13. The panel further rejected any suggestion that the tribe lacked the power to enforce that regulatory interest by extending tribal *adjudicatory* jurisdiction to this case. "The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court," the court held, "makes no difference." *Id.* "Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for

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[3] Respondents did not claim that the second *Montana* exception applied. *See* Pet. App. 10 n.2.

[petitioners] to have to answer in tribal court for harm caused to the child in the course of his employment." *Id.* 13-14.

Nothing more is required, the panel held. Pet. App. 16. The court acknowledged that in *Plains Commerce Bank*, this Court had held that it was not enough that a dispute arise out of a consensual relationship because "[e]ven then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* 15-16 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). But the majority concluded that the "ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." *Id.* 16.

Accordingly, the panel held, all that is required in order to subject nonmembers to tort claims in tribal court is a "logical nexus" between the activity giving rise to the tort claim and "some consensual relationship between a business and the tribe or its members." Pet. App. 17.

b. Judge Smith wrote a scathing dissent. He described the opinion as an "alarming and unprecedented holding [that] far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant." Pet. App. 22. He noted, for example, that under *Oliphant*, "store manager Townsend could not have been criminally prosecuted in tribal court for the alleged molestation of John Doe." *Id.* 23. "Although the Supreme Court has not yet explicitly adopted an

Oliphant-like rule for civil cases, it has 'never held that a tribal court had jurisdiction over a nonmember defendant." *Id.* 24 (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001)).

In Judge Smith's view, because the relationship between petitioners and Doe had no impact on tribal self-government or internal relationships, it could never form the basis for the application of *Montana*'s consensual relationship exception. Pet. App. 23-28. But even if the consensual relationship exception applied, the dissent concluded, petitioners' participation in the tribal job training program did not carry implicit consent to be subject to the jurisdiction of the tribal court for "any and all tort claims actionable under tribal law" arising from Doe's internship. *Id.* 31. Judge Smith noted that the "elements of Doe's claims under Indian tribal law are unknown to [petitioners] and may very well be undiscoverable by it," given that tribal law includes unwritten "customs . . . and usages of the tribes" that trump state common law. *Id.* 30 (ellipses in original) (quoting Choctaw Tribal Code § 1-1-4) (internal quotation marks omitted). This is in stark contrast to the type of regulation encompassed by the first *Montana* exception, which "envisages discrete regulations consented to *ex ante*." *Id.* 32.

Judge Smith further emphasized the breadth of the court's ruling, noting that while the majority opinion focused on the particularly odious sexual assault claim in this case, there was no principled reason why its rationale would not also extend to any other tort injury – including, for example, slip-and-fall claims – suffered on the job. *Id.* 33.

2. Five judges dissented from denial of rehearing en banc. In addition to being wrong, for the reasons stated in Judge Smith's opinion, the dissenters explained that the ruling "profoundly upsets the delicate balance" this Court's decision have struck on "a question of exceptional importance." Pet. App. 94 (citations and omitted internal quotation marks). "Until now, no circuit court of appeals had upheld Indian-court jurisdiction, under the so-called 'first exception' announced in [*Montana*] over a tort claim against a non-Indian defendant." *Id.* The dissenters believed that if "this court is to work such a change in established precedent, it should be the careful work of the full court and not just a two-judge majority." *Id.*

REASONS FOR GRANTING THE WRIT

Respondent Doe, like any citizen of the State of Mississippi, was entitled to litigate his claims against petitioners in the courts of that State. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). His family turned instead to the courts of an Indian tribe to which they belong and petitioners are strangers. It is undisputed that those courts lack jurisdiction over the individual who allegedly assaulted Doe. The question is whether the tribal courts may nonetheless exercise jurisdiction over the nonmember corporation that employed the alleged perpetrator.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court highlighted that it has "never held that a tribal court had jurisdiction over a nonmember defendant" and that it was an "open question" whether tribal courts may ever exercise civil jurisdiction over

nonmembers. *Id.* at 358 & n.2. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), this Court granted certiorari to resolve that question for an important subset of civil cases – tort suits against nonmember defendants for injuries arising in the course of commercial, employment, or other consensual relationships with tribe members. But the Court ultimately resolved the case on other grounds, leaving the uncertainty in its precedents unresolved.

This case presents the Court a chance to complete the critically important, unfinished business of defining the scope of tribal authority to adjudicate tort claims against nonmembers. In the absence of guidance from this Court, the Fifth Circuit has decided that tribal courts in fact enjoy broad jurisdiction to adjudicate tort claims against nonmember defendants whenever the tort has any "logical nexus" with a consensual relationship (for example, an employment relationship) between the plaintiff and nonmember defendant. This Court has repeatedly recognized the gravity of such a decision, explaining that subjecting nonmembers to tribal court jurisdiction risks serious intrusions on individual liberty, given the incomplete guarantee of Due Process protections in that forum. The facts of this case – in which respondent seeks millions of dollars in damages, including punitive damages, against a nonmember employer on a theory of vicarious liability – illustrate what is at stake for tens of thousands of nonmember corporations and individuals who do business on tribal reservations. Even more so than when the Court granted certiorari

to resolve this issue in *Plains Commerce Bank*, this Court's review is required.

I. This Case Squarely Presents The Issue Left Open In *Hicks* And The Question The Court Granted Certiorari To Decide But Left Unresolved In *Plains Commerce Bank*.

This case presents the Court an opportunity to resolve the question it granted certiorari to answer, but did not reach, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). In so doing, the Court would also begin to resolve the open question noted in *Nevada v. Hicks*, 533 U.S. 353 (2001), by deciding whether tribal courts have jurisdiction over one of the most important and recurring classes of civil litigation. Given the profound and immediate impact of the Fifth Circuit's decision on thousands of nonmember individuals and companies doing business on reservations, that important guidance should not be delayed.

1. In *Plains Commerce Bank*, tribal members attempted to sue a nonmember bank in tribal court, alleging torts arising from the bank's sale of non-Indian land. The Eighth Circuit concluded that the defendant had entered into a consensual relationship with the tribe members within the meaning of the first *Montana* exception. *Plains Commerce Bank v. Long Family Land & Cattle* Co., 491 F.3d 878, 886 (8th Cir. 2007), rev'd, 554 U.S. 316 (2008). But, the court explained, the "existence of a consensual relationship is not alone sufficient to support tribal jurisdiction." *Id.* "The tribal exercise of authority must also take the form of taxation, licensing, or 'other means' of regulating the activities of the

nonmember. . . . " *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). The question was whether subjecting nonmembers to tort adjudication in tribal court counted as a permissible "other means" of regulating nonmember conduct under *Montana*. *Id.* The court of appeals held that it was. *Id.* at 887 (reasoning that the "fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here").

This Court granted certiorari to review that conclusion. Specifically, the Court granted certiorari to decide the question:

> Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?

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However, the Court never answered that question because it resolved the case on other grounds. Specifically, the Court held that tribes lack the inherent authority to regulate the sale of non-Indian land, regardless of the form of regulation. 554 U.S. at 340. Accordingly, the Court left unresolved whether *Montana* permits tribes to regulate other aspects of consensual relationships by subjecting nonmembers to tort suit in tribal court.

This case directly presents that question. Over a vigorous dissent, the Fifth Circuit majority squarely held that the first *Montana* exception authorizes tribal regulation of consensual relationships by means of tort suits in tribal court. The panel held that a "tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework" and insisted that the "fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference." Pet. App. 10, 13. The majority thus rejected Judge Smith's objection that consensual relation cannot subject a defendant "to the entire – and largely undefined – body of Indian tribal tort law," *id.* 30, because "*Montana*'s first exception envisages discrete regulations consented to *ex ante*" rather than "after-the-fact imposition of an entire body of tort law," *id.* 32.

2. Having previously decided that the question presented by this petition warrants review, there is no reason for the Court to delay providing an answer. Indeed, the breadth and dramatic consequences of the ruling below require this Court's immediate attention.

Although this Court has "never held that a tribal court had jurisdiction over a nonmember defendant," *Hicks*, 533 U.S. at 358 n.2, the decision below foreordains that non-Indian businesses and individuals will be forced to litigate all manner of tort claims in tribal courts that are neither subject to the Bill of Rights nor endowed with the independence required for fair treatment of outsiders. *See Duro v. Reina*, 495 U.S. 676, 693 (1990); *infra* 19-20. Under the decision in this case, all that is required before a

tribal court may exercise tort jurisdiction over a nonmember is that: (1) the defendant have entered into a consensual relationship with the plaintiff, and (2) there be a "logical nexus" between that relationship and the tort. Pet. App. 17.

As applied to this case, that means that an employer is subject to tort claims for any "harm caused to the [employee] in the course of his employment." Pet. App. 13-14.[4] The breadth of that application is dramatic enough, given the tens of thousands of tribal members employed by nonmember businesses (including merchants like petitioners, health care providers, mining and energy companies, and casino contractors). At the same time, if tribes may use tort law to regulate employment relationships, there would seem no basis for excluding torts arising in other similarly consensual commercial relationships, including a business's relationship with its customers.

Moreover, as Judge Smith demonstrated, there is no principled basis for restricting the decision in this case to heinous offenses like sexual assaults.[5] *See* Pet. App. 33. The panel majority premised the Tribe's authority on its right to "regulate the working conditions" of employees, and its interest in protecting members' "health and safety." *Id.* 16.

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[4] The panel recognized that Doe was a short-term intern but treated him, for purposes of its analysis, as the equivalent of an ordinary employee. *See* Pet. App. 2-3, 12, 16.

[5] Notably, petitioners are charged not with assault but with, at best, negligence in hiring, training, and supervising the perpetrator. Pet. App. 3.

Those interests surely are furthered by imposing tort liability for accidents (*e.g.*, an employee "slipp[ing] on a poorly-maintained floor at the store") or other forms of injurious intentional misconduct. *Id.* 33 (Smith, J., dissenting).

This is no small matter. The Fifth Circuit's decision opens the tribal courthouse doors wide for members to file lawsuits against non-members for individual tort claims that – until now – had to be brought in state or federal court where nonmembers enjoy constitutional protections. Now, nonmembers can be hauled into tribal courts for tort claims arising out of any type of consensual conduct on the reservations, such as gambling at an Indian casino, playing golf, eating at an on-reservation restaurant, etc. Once in tribal court, the nonmember is subject to an unwritten set of laws and customs to be determined and applied by the Tribe. *See* Pet. App. 30-31 (Smith, J., dissenting). This matters because nonmembers have no say, directly or through legislative representation, in the laws, regulations, or court system of the Tribe. *Id.* Adjudication without representation for nonmembers is now the rule, not the exception.

Uncertainty in this area is particularly harmful. Faced with the prospect of exposure to potential liability (including for punitive damages) that may far outstrip the benefit of doing business on a reservation, some businesses may simply withdraw from communities in which unemployment is already high and access to commercial services (like low-cost merchandise stores) is low. *See, e.g.*, *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing*

Before the S. Comm. on Indian Affairs, 111th Cong. (2010).

At the same time, the "lack of certainty regarding the applicable law or applicable forum can add transaction costs to already expensive economic disputes." *See* Paul A. Banker & Christopher Grgurich, *The* Plains Commerce Bank *Decision and Its Further Narrowing of the* Montana *Exceptions as Applied to Tribal Court Jurisdiction over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565, 566 (2009-2010). In this case, for example, litigation over the appropriate forum has already taken nearly ten years.

II. Absent Congressional Authorization, Tribal Courts Have No Jurisdiction To Adjudicate Tort Claims Against Nonmembers.

Certiorari is further warranted because the court of appeals' decision is wrong. Tribal courts lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress.

1. This Court has rightly questioned whether tribal courts should ever be deemed to have jurisdiction over nonmembers without Congress's authorization. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). The "special nature of the tribunals at issue," *Duro v. Reina*, 495 U.S. 676, 693 (1990), gives rise to unique concerns. After all, "Indian courts differ from traditional American courts in a number of significant respects." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citation omitted). The "Bill of Rights does not apply to Indian tribal governments," and although the "Indian Civil Rights Act of 1968

provides some statutory guarantees of fair procedure," those "guarantees are not equivalent to their constitutional counterparts." *Duro,* 495 U.S. at 693. Moreover, "there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law," such as compliance with the Indian Civil Rights Act, "since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." *Hicks*, 533 U.S. at 385 (Souter, J., concurring). At the same time, "[t]ribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms." *Duro*, 495 U.S. at 693 (citation and internal quotation marks omitted). And, of course, "nonmembers have no part in tribal government. . " *Plains Commerce Bank*, 554 U.S. at 337.

These considerations have led this Court to preclude tribal court criminal jurisdiction over nonmembers without congressional authorization. *See Duro*, 495 U.S. at 693-94. The same basic concerns apply in the civil context as well. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Hicks*, 533 U.S. at 383-85 (Souter, J., concurring). Indeed, permitting tribal courts to exercise tort jurisdiction over nonmembers would lead to the anomaly that although deprived of inherent authority to criminally punish nonmembers for injuring tribal members, even by imposing a fine, tribal courts could nonetheless impose ruinous punitive damages awards that have the same purpose and effect. One need not conclude that punitive damages are a form of criminal punishment, *see* Pet. App. 21, to recognize

that considerations that led this Court to hold criminal jurisdiction over nonmembers presumptively unavailable to tribal courts likewise support limiting tribal jurisdiction over tort claims.

2. Against this backdrop, *Montana*'s first exception cannot reasonably be construed to permit a tribe to subject nonmembers to tort litigation in tribal court simply because the tort bears a "logical nexus" to an employment or other consensual relationship. Pet. App. 17.

This Court has admonished that the *Montana* exceptions are "limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (citations and internal quotation marks omitted). But as discussed, the panel's interpretation of the first exception would allow pervasive tort liability against countless business and individuals who interact with tribe members in business, employment, or other consensual relationships.

As this Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (internal quotation marks omitted)). There must be a nexus. *Id.* Critically, this Court's decisions make clear that the nexus required is not simply a "logical" one, as the panel wrongly held. *See* Pet. App. 17. The first *Montana* exception must be construed to avoid "the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Plains Commerce Bank*, 554 U.S. at 337. And a nonmember can effectively consent only to exercises

of tribal authority that are reasonably foreseeable. *Id.* at 337-338.

Accordingly, when the Court in *Montana* spoke of a tribe regulating nonmembers "through taxation, licensing, or other means," it had in mind modes of regulation that permit nonmembers to ascertain, *ex ante*, the scope of their exposure to tribal authority and litigation. *See* Pet. App. 32 (Smith, J., dissenting). For example, a business can determine the tribe's general tax rules and licensing requirements prior to deciding whether to do business with a tribe or its members.[6]

But tort claims are vitally different. Tort law is generally unwritten and often vague, its rules given specific content by juries in particular cases only after the fact. *See Plains Commerce Bank*, 554 U.S. at 338 (noting that the "novel" tort claim in that case "arose directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom, including the Lakota sense of justice, fair play and decency to others") (citation and internal quotation marks omitted). In the American common law system, tort principles can be given greater specificity in the course of case-by-case adjudication

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[6] It is thus no coincidence that three of the four cases the Court cited in *Montana* as examples of this exception involved tribes imposing "taxes on economic activity by non-members." *Plains Commerce Bank*, 554 U.S. at 332. The fourth example, *Williams v. Lee*, 358 U.S. 217 (1959), involved a contract claim brought *by* a nonmember merchant against a tribe member for failing to pay for goods provided on credit (and, therefore, raised no question of submitting an unwilling nonmember to tribal court jurisdiction, much less on the basis of unwritten tort law).

over time. But tribes are not required to follow those traditions. *See id.* Tribal law instead is often based on customs that that are unfamiliar (and even inaccessible) to nonmembers. *See Hicks*, 533 U.S. at 384-85 (Souter, J., concurring); Pet. App. 30 (Smith, J., dissenting). And tribal courts need not (and some do not) codify their tort law or collect their decisions in published reporters, relying instead on the oral testimony from tribal elders in each case regarding their understanding of what tribal customs require. Pet. App. 30-31 (Smith, J., dissenting).

In short, there can be no confidence that by entering into a consensual relationship with a tribe member, businesses like petitioners have consented, in any meaningful sense, to be bound by tort rules they may be unable even to discern, or agreed to have those rules applied to them in an unfamiliar court.

Thus, while tribal court jurisdiction over nonmembers is troublesome in *any* case, it is particularly unwarranted in tort cases and should not be allowed absent authorization from Congress.

3. To be sure, as the panel observed, tribes have an interest in the health and welfare of their members. Pet. App. 16. But this Court has made clear that such an interest is not, as a general matter, a sufficient justification for exercising tribal jurisdiction over nonmembers. The Court thus has been clear that tribes do not retain authority to regulate even very harmful conduct by nonmembers simply by virtue of their voluntary decision to enter tribal lands. *See, e.g.*, *Duro*, 495 U.S. at 685-86. Indeed, the Court's clearest rule in this area is that tribes retain no inherent authority to subject nonmembers to punishment in tribal courts, even for

the murder of tribal members. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). While a tribe may exclude nonmembers from its territory (as it did the alleged perpetrator in this case, *see* Pet. App. 77-78), it must rely on the courts of the states and the United States to mete out punishment and recompense.

The tribal interest in redirecting such litigation to its own courts is particularly attenuated in a case like this. Here, the lower court held (and respondent did not challenge on appeal) that the tribal courts lacked jurisdiction over the actual perpetrator of the alleged assaults (reasoning that Townsend had no consensual relationship with the Tribe or Doe). Pet. App. 72-73. The only basis for liability alleged against petitioners is indirect – vicarious liability or, at worst, negligence in hiring, training, and supervising Townsend. *Id.* 3.

As in the criminal context, depriving tribal courts of jurisdiction does not mean that tribes have no recourse for nonmember conduct that injures tribe members. *See generally Duro*, 495 U.S. at 696-97 The courts of the states (and, in a case like this, with diverse parties, the United States), remain open to provide relief for members who suffer injuries at the hands of outsiders. Pet. App. 27 (Smith, J., dissenting).

Moreover, it may be that when tortious conduct poses a grave and direct threat to tribal self-government (*i.e.*, when it satisfies the requirements of the second *Montana* exception), assertion of tribal court jurisdiction is justified. In such cases, it could be that an extraordinary threat to tribal self-rule warrants an extraordinary exception to the general

rule that tribes may exercise power only over their own members. But the mere fact that a defendant has employed a tribal member, or engaged in a business transaction with a tribe, does not justify subjecting nonmembers to suit in tribal court for ordinary tort claims without Congress's approval.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-60668

DOLGENCORP, INC. and
DOLLAR GENERAL CORP.

Plaintiffs-Appellants

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, in his official capacity; JOHN DOE, a minor, by and through his parents and next friends JOHN DOE SR. AND JANE DOE

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Mar. 14, 2014)

Before SMITH, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

The court previously issued its opinion in this case on October 3, 2013. *Dolgencorp, Inc. v. Miss.*

Band of Choctaw Indians, 732 F.3d 409 (5th Cir. 2013). We hereby withdraw the previous opinion and substitute the following.

Dolgencorp, Inc. and Dollar General Corp. (collectively "Dolgencorp") brought an action in the district court seeking to enjoin John Doe, a member of the Mississippi Band of Choctaw Indians, and other defendants (collectively "the tribal defendants") from adjudicating tort claims against Dolgencorp in the Choctaw tribal court. The district court denied Dolgencorp's motion for summary judgment and granted summary judgment in favor of the tribal defendants, concluding that the tribal court may properly exercise jurisdiction over Doe's claims. Because we agree that Dolgencorp's consensual relationship with Doe gives rise to tribal court jurisdiction over Doe's claims under *Montana v. United States,* 450 U.S. 544, 564-66 (1981), we AFFIRM the district court's judgment.

BACKGROUND

Dolgencorp operates a Dollar General store on the Choctaw reservation in Mississippi. The store sits on land held by the United States in trust for the Mississippi Band of Choctaw Indians, and operates pursuant to a lease agreement with the tribe and a business license issued by the tribe. At all relevant times, Dale Townsend was the store's manager. The tribe operates a job training program known as the Youth Opportunity Program ("YOP"), which attempts

to place young tribe members in short-term, unpaid positions with local businesses for educational purposes. In the spring of 2003, Townsend, in his capacity as manager of the store, agreed to participate in the YOP. Pursuant to this program, John Doe, a thirteen-year-old tribe member, was assigned to the Dollar General store. Doe alleges that Townsend sexually molested him while he was working at the Dollar General store.

In January 2005, Doe sued Dolgencorp and Townsend in tribal court. Doe alleges that Dolgencorp is vicariously liable for Townsend's actions, and that Dolgencorp negligently hired, trained, or supervised Townsend. Doe further alleges that the assault has caused him severe mental trauma, and seeks "actual and punitive damages in a sum not less than 2.5 million dollars."

Dolgencorp and Townsend filed motions in the tribal court seeking to dismiss Doe's claims based on lack of subject-matter jurisdiction. The tribal court denied both motions. Both parties petitioned the Choctaw Supreme Court for interlocutory review of the lower court's order denying the motions to dismiss. Under an analysis based on *Montana v. United States,* 450 U.S. 544 (1981), the Choctaw Supreme Court held that subject-matter jurisdiction existed as to both Dolgencorp and Townsend and therefore dismissed the appeal, remanding the case to the lower court.

On March 10, 2008, Dolgencorp and Townsend filed an action in the U.S. District Court for the Southern District of Mississippi against the tribal defendants. Dolgencorp and Townsend allege that the tribal court lacks jurisdiction over them in the suit filed by Doe and seek to enjoin the prosecution of Doe's suit in tribal court. Dolgencorp and Townsend each filed a subsequent motion for a temporary restraining order and a preliminary injunction.

The district granted Townsend's motion but denied Dolgencorp's motion. The district court reasoned that "[i]f John Doe performed services for Dolgen that had value to Dolgen such that Dolgen enjoyed a commercial benefit from its agreement to allow his placement in its store, then it would be reasonable to conclude that there existed the kind of consensual relationship required by *Montana*'s first exception."[1] *Dolgen Corp.* [sic], *Inc. v. Mississippi Band of Choctaw Indians,* No. 4:08CV22, 2008 WL 5381906, at *5 (S.D. Miss. Dec. 19, 2008). The district court found no evidence as to "whether Dolgen's participation was essentially gratuitous or whether it received a commercial benefit from the arrangement." *Id.* at *6. Accordingly, the district court held that Dolgencorp had

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[1] As explained more fully below, *Montana* and its progeny provide two exceptions to the general rule that Indian tribes cannot exercise civil jurisdiction over non-members. The first *Montana* exception, also known as the consensual relationship exception, provides that a tribe may regulate conduct that has a nexus to some consensual relationship between the non-member and the tribe or its members.

not carried its burden of establishing likely success on the merits (*i.e.* showing that the first *Montana* exception does not apply). *Id.* The district court also rejected Dolgencorp's argument that Doe's lawsuit has no nexus to the alleged consensual relationship between Dolgencorp and the tribe regarding the YOP. *Id.* However, the district court held that because Townsend personally had not entered into any consensual relationship with either the tribe or Doe, the tribal court had no jurisdiction over him. *Id.* at *7.

Dolgencorp and the tribal defendants subsequently filed cross motions for summary judgment. In its order granting the tribal defendants' motion and denying Dolgencorp's motion, the district court explained:

> It now appears undisputed that Dale Townsend, purportedly on behalf of Dolgen, agreed with the Tribe to participate in the Tribal Youth Opportunity Program, and that based on such agreement, John Doe was placed in the Dollar General store under Townsend's direct supervision. Doe did not thereby become an employee of Dolgen, but he functioned as an unpaid intern or apprentice, receiving job training from Dolgen and in turn provid[ing] free labor to Dolgen for the period of his assignment. In the court's opinion, as a consequence of this arrangement, Dolgen implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship.

Dolgencorp Inc. v. Mississippi Band of Choctaw Indians, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011)

(footnote omitted). The district court further held that Doe's tort claims, "being based on Townsend's alleged molestation of John Doe during his tenure at the store, arise directly from this consensual relationship so that the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority is satisfied." *Id.*

The district court also rejected Dolgencorp's argument, based on *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008), that "the consensual relationship exception does not support tribal jurisdiction since the nonmember conduct at issue does not implicate tribal governance or internal relations." *Dolgencorp,* 846 F. Supp. 2d at 650-51. The district court explained:

> The parties disagree as to the meaning and import of *Plains Commerce Bank* with respect to the first *Montana* exception. Plaintiffs submit that under the Court's interpretation of the exception in *Plains Commerce Bank,* no longer will every consensual relationship between a nonmember and a tribal member occurring on the reservation be sufficient to establish tribal jurisdiction over claims with a nexus to that relationship; rather, only those consensual relationships that are evaluated and determined to have an impact on tribal self governance or internal relations will trigger tribal jurisdiction. Plaintiffs contend that since the consensual relationship here involved does not implicate tribal self-governance or internal relations,

> then the exception does not apply and there can be no basis for tribal jurisdiction.
>
> Defendants, on the other hand, maintain that nothing in *Plains Commerce Bank* altered the basic *Montana* framework and that to establish applicability of the consensual relationship exception, no showing is required to be made beyond the existence of the consensual relationship which supports a finding of consent to tribal jurisdiction, and the nexus between the consensual relationship and exertion of tribal authority. According to defendants, it is implicit in *Montana* and its progeny that the right of Indian tribes to self governance includes the right to adjudicate civil disputes arising from voluntary consensual relationships between tribes and their members and nonmembers. That is, disputes arising from member-nonmember or tribe-nonmember consensual relationships are deemed as a matter of law to impact tribal rights of self-government sufficient to permit the exercise of tribal court jurisdiction to adjudicate such disputes.

Id. at 652-53 (footnote omitted). The district court agreed with the tribal defendants' position, stating that "although a number of post-*Plains Commerce Bank* cases have considered the consensual relationship exception, none has identified the additional showing advocated by plaintiffs as a prerequisite to its application." *Id.* at 653-54 & n.3. Accordingly, the district court concluded that tribal court jurisdiction

was permitted under the first *Montana* exception. *Id.* at 654.

Dolgencorp appealed. Dolgencorp does not contend that there are disputed questions of material fact; instead, it argues that the district court erred in its legal determination that the *Montana* consensual relationship exception was satisfied.

DISCUSSION

This case deals with the inherent sovereign authority of Indian tribes. Indian tribes can be viewed as independent sovereign communities that have lost some aspects of sovereignty. *See, e.g., United States v. Wheeler,* 435 U.S. 313, 322-23 (1978).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. at 323. The Supreme Court has recognized that "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 (1983). Moreover, "[t]ribal courts

play a vital role in tribal self-government, . . and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14-15 (1987).

Generally, Indian tribes retain the power to govern themselves and to control relations between members of the tribe. *See Wheeler,* 435 U.S. at 326. On the other hand, "by virtue of their dependent status," Indian tribes have been largely divested of control over external relations; *i.e.* "relations between an Indian tribe and nonmembers of the tribe." *See id.* In other words, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana,* 450 U.S. at 564.

In *Montana,* the Supreme Court recognized that generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court explained:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial

> dealing, contracts, leases, or other arrangements.[2]

Id. The Court later held that "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 656 (2001). Despite the limitations recognized in *Montana* and subsequent cases, the Court has consistently acknowledged that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut.,* 480 U.S. at 18.

"[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997) (quotation and brackets omitted). A tribe's regulation of nonmember conduct through tort law is analyzed under the *Montana* framework. *See, e.g., Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe,* 609 F.3d 927, 938 (8th Cir. 2010) ("If the Tribe retains the power under *Montana* to regulate . . . conduct, we fail to see how it makes

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[2] The Court further held that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566. Because the tribal defendants do not argue that this second exception is applicable here, we do not consider it further.

any difference whether it does so through precisely tailored regulations or through tort claims. . . ."); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 939 (9th Cir. 2009) ("The *Montana* framework is applicable to tribal adjudicative jurisdiction, which extends no further than the *Montana* exceptions.").[3] In considering regulation through tort law, "courts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Attorney's Process*, 609 F.3d at 938.

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[3] The dissenting opinion suggests that "[b]efore today, no circuit court has upheld Indian-court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant." However, every circuit court to consider the question – including the Fifth Circuit – has either held or assumed that tribal courts may exercise jurisdiction over tort claims against nonmembers under the first *Montana* exception. *See, e.g., Bank One, N.A. v. Shumake*, 281 F.3d 507, 509-12 & n.13 (5th Cir. 2002) (finding colorable tribal court jurisdiction over fraud claims by Choctaw tribe members against a non-member bank based on the first *Montana* exception, such that tribal exhaustion was required). No circuit court has held that such tort claims are not allowed or suggested that they should be treated differently from other types of regulation of non-member conduct. Furthermore, no circuit court has held that tribal court tort jurisdiction over a non-member is allowed under the first *Montana* exception only where such jurisdiction is shown in that specific case to be necessary to protect tribal self-government or to control internal relations.

Dolgencorp presents several arguments as to why tribal court jurisdiction over Doe's tort claims is not justified under the *Montana* consensual relationship exception.

I. Commercial relationship

Under *Montana,* a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, *or other arrangements.*" 450 U.S. at 565 (emphasis added). Relying on a single repudiated appellate opinion, Dolgencorp argues that "'other arrangements' . . also must be of a commercial nature." *Boxx v. Long Warrior,* 265 F.3d 771, 776 (9th Cir. 2001); *see Smith v. Salish Kootenai College,* 434 F.3d 1127, 1137 n.4 (9th Cir. 2006) (en banc) (disapproving of this language in *Boxx*). In other words, Dolgencorp argues that noncommercial relationships do not give rise to tribal jurisdiction under the first *Montana* exception. We decline to impose such a restriction, which does not appear to be supported by any compelling rationale. Moreover, such a requirement would be easily satisfied in this case. Although Doe worked for only a brief time at the Dollar General store and was not paid, he was essentially an unpaid intern, performing limited work in exchange for job training and experience. This is unquestionably a relationship "of a commercial nature."

II. Nexus

Dolgencorp argues that there is no nexus between its participation in the YOP and Doe's tort claims. We disagree. The conduct for which Doe seeks to hold Dolgencorp liable is its alleged placement, in its Dollar General store located on tribal lands, of a manager who sexually assaulted Doe while he was working there. This conduct has an obvious nexus to Dolgencorp's participation in the YOP. In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference. *See, e.g., Attorney's Process,* 609 F.3d at 938. To the extent that foreseeability is relevant to the nexus issue, as Dolgencorp suggests, it is present here. Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer

in tribal court for harm caused to the child in the course of his employment.[4]

Dolgencorp confuses the merits of Doe's case with the question of tribal jurisdiction. It may very well be that Dolgencorp did not do, or fail to do, anything that would cause it to be held liable to Doe. The nexus component of the tribal jurisdiction question, however, centers on the nexus between the *alleged*

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[4] The dissenting opinion suggests that the nexus is insufficient here because "Dolgencorp could not have anticipated that its consensual relationship with Doe would subject it to any and all tort claims actionable under tribal law." We are not concerned here with "any and all tort claims actionable under tribal law." Doe has brought two specific claims, both of which are based on the alleged sexual molestation of a child by a store manager. We suspect that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law. Accordingly, under the facts of this case, we need not reach the hypothetical factual scenarios posited by the dissenting opinion.

Furthermore, we do not agree that tribal law and tribal court are entirely unfamiliar to Dolgencorp. For example, in its commercial lease agreement, Dolgencorp agrees to "comply with all codes and requirements of all tribal and federal laws and regulations" pertaining to the leased premises. The agreement also provides that it "shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi" and that it "is subject to the Choctaw Tribal Tort Claims Act." Finally, the agreement provides that "[e]xclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians." Although we do not consider whether the lease agreement in itself would have a sufficient nexus to support tribal court jurisdiction over Doe's tort claims, we highlight this agreement to show that a business operating on Indian land in a reservation is unlikely to be surprised by the possibility of being subjected to tribal law in tribal court.

misconduct and the consensual action of Dolgencorp in participating in the YOP.

III. The effect of *Plains Commerce*

Dolgencorp argues that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships "implicate tribal governance and internal relations." In *Plains Commerce,* 554 U.S. at 334-35, the Supreme Court described the *Montana* consensual relationship exception as follows:

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten self-rule. To the extent they do, such activities or land uses may be regulated. Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

(citation and parenthetical omitted). The Court further stated:

> [Indian] laws and regulations may be fairly imposed on nonmembers only if the nonmember

> has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U.S., at 564, 101 S.Ct. 1245.

Id. at 337.

We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, "intrude[s] on the internal relations of the tribe or threaten[s] self-rule." It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

Dolgencorp notes the statement in *Plains Commerce* that "a business enterprise employing tribal members . . . *may* intrude on the internal relations of the tribe or threaten self-rule," and that "[t]o the extent [it does], [its] activities . . . may be regulated." 554 U.S. at 334-35 (emphasis added). This statement expresses nothing more than the uncontroversial proposition that a tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe

members. However, such a limitation is already built into the first *Montana* exception. Under that exception, the tribe may only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members. *See, e.g., Philip Morris,* 569 F.3d at 941 ("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts.").

Our conclusion is strengthened by the fact that since *Plains Commerce* was decided, no court has, despite finding a consensual relationship with a nexus to a tribal regulation, rejected tribal jurisdiction because the relationship did not "implicate tribal governance and internal relations."[5] We also note that any discussion in *Plains Commerce* of tribal authority to regulate nonmember conduct under *Montana* is dicta; its result is based on a holding that *Montana*

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[5] Two district court opinions have suggested that such an additional showing is necessary but have not relied on its absence to reject tribal jurisdiction. *Salt River Project Agricultural Improvement and Power District v. Lee,* No. 08-CV-8028, 2013 WL 321884 at *13-15 (D. Az. Jan. 28, 2013) (finding the first *Montana* exception applicable and stating that "regulating employment implicates the tribe's sovereign authority to control internal relations"); *Rolling Frito-Lay Sales LP v. Stover,* No. 11-CV-1361, 2012 WL 252938 at *4 (D. Az. Jan. 26, 2012) (rejecting tribal court jurisdiction based on a lacking nexus between the consensual relationship and the tort claim).

does not allow a tribe to regulate the sale of land owned by a non-member. *See, e.g., Plains Commerce,* 554 U.S. at 340 ("*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things.").[6]

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[6] The dissenting opinion, relying on law review articles and dicta from *Plains Commerce,* would adopt a "profoundly narrow" interpretation of the *Montana* consensual relationship exception. As the dissent all but admits, this would read the first *Montana* exception out of existence. If regulation of some consensual relationship is necessary to protect tribal self-government or to control internal relations, it would seem to fall necessarily within the second *Montana* exception, which allows tribes to regulate non-member conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566.

This highly restrictive interpretation appears to be largely driven by the concern that subjecting non-members to the jurisdiction of tribal courts will violate their due process rights, a concern we find to be exaggerated. It is true that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Nevada v. Hicks,* 533 U.S. 353, 383 (2001) (Souter, J., concurring). However, the Indian Civil Rights Act of 1968 imposes numerous constraints on Indian tribes, including a provision that no tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). Although the interpretation of this statute may not precisely track the Supreme Court's interpretation of the analogous constitutional language, *see id.* at 384, we have no reason to believe that this results in injustice to litigants. While

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IV. Off-reservation conduct

Dolgencorp argues that Doe failed to adequately allege and prove that Dolgencorp's negligent hiring, training, or supervision of Townsend occurred on the reservation.[7] However, Dolgencorp failed to present this argument either to the district court or to the tribal courts. "Under this Circuit's general rule, arguments not raised before the district court are waived and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.'" *AG Acceptance Corp. v. Veigel,* 564 F.3d 695, 700 (5th Cir.

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hypothesizing about potential unfairness in a tribal court, neither Dolgencorp nor the dissenting opinion points to any actual unfairness in the procedures of this particular tribal court.

[7] Although the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations, this is at least strongly implied. For example, *Plains Commerce* states that "*Montana* and its progeny permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests." 554 U.S. at 332 (emphasis added and removed); *see also Philip Morris,* 569 F.3d at 938 ("The jurisdiction of tribal courts does not extend beyond tribal boundaries."); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court,* 133 F.3d 1087, 1091-92 (8th Cir. 1998) ("Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations.*"); *but see DISH Network Service L.L.C. v. Laducer,* 725 F.3d 877, 884 (8th Cir. 2013) ("Even if the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim arises out of and is intimately related to DISH's contract with Brian and that contract relates to activities on tribal land.").

2009). Because Dolgencorp has not demonstrated extraordinary circumstances, we decline to consider this argument for the first time on appeal.

Dolgencorp notes that a tribal court's jurisdiction over a nonmember is an issue of subject-matter jurisdiction. *See Nevada v. Hicks,* 533 U.S. 346, 367 n.8. Dolgencorp further notes that because the "concept of subject-matter jurisdiction . . . can never be forfeited or waived . . [,] defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton,* 535 U.S. 625, 630 (2002). Dolgencorp therefore contends that arguments pertaining to the tribal court's lack of jurisdiction can never be waived.

Although it is true that defects in *federal* subject-matter jurisdiction cannot be waived in a federal case, a federal court has no independent obligation to "correct" a tribal court's lack of subject-matter jurisdiction over another case. Dolgencorp, as a plaintiff, must set forth a meritorious case to enjoin the tribal court proceedings based on lack of subject-matter jurisdiction. If it fails to present its arguments at the appropriate time, they are generally waived.

V. Punitive damages

Dolgencorp argues that the tribal court lacks jurisdiction over Doe's claims because Doe seeks punitive damages. Because the inherent sovereign authority of Indian tribes does not include criminal jurisdiction over non-Indians, Indian tribes "do not have inherent

jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 195, 212 (1978). Dolgencorp argues, based on *Oliphant,* that Indian tribes likewise have no jurisdiction to impose civil punitive damages on a nonmember. Dolgencorp notes that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks,* 533 U.S. at 383 (Souter, J., concurring). Dolgencorp also notes that an award of punitive damages may implicate constitutional protections against excessive punishment, in that "grossly excessive" punitive damages awards violate the Due Process Clause of the Fourteenth Amendment. *BMW of North America v. Gore,* 517 U.S. 559, 568 (1996). Dolgencorp therefore argues: "Because these protections are not present in tribal court, federal recognition of tribal jurisdiction over non-Indians in claims for punitive damages would in and of itself violate the Due Process clause. The federal government simply cannot waive a citizen's constitutional right by making them subject to the jurisdiction of a court where constitutional rights do not apply."

Dolgencorp identifies no authority applying *Oliphant* in the context of civil punitive damages or otherwise holding that Indian tribes are categorically prohibited from imposing punitive damages on nonmembers. Although punitive damages share many characteristics of criminal punishment, they are distinct; for example, punitive damages in civil cases do not invoke double jeopardy concerns. *See, e.g., Hudson v. United States,* 522 U.S. 93, 103 (1997)

(a penalty that is "civil in nature" does not implicate double jeopardy). Furthermore, Dolgencorp's broader argument simply proves too much. If the federal government could never "waive a citizen's constitutional right" by subjecting him to the jurisdiction of a court lacking full constitutional protections, a non-Indian could *never* be subjected to tribal court jurisdiction. Yet the Supreme Court has acknowledged that by entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts. Accordingly, we conclude that the availability of punitive damages has no effect on the tribal court's jurisdiction over Doe's claims against Dolgencorp.

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

For the first time ever, a federal court of appeals upholds Indian tribal-court tort jurisdiction over a non-Indian, based on a consensual relationship, without a finding that jurisdiction is "necessary to protect tribal self-government or to control internal relations." *Montana v. United States,* 450 U.S. 544, 564 (1981). The majority's alarming and unprecedented holding far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant.

This ruling profoundly upsets the careful balance that the Supreme Court has struck between Indian tribal governance, on the one hand, and American sovereignty and the constitutional rights of U.S. citizens, on the other hand. The majority's bold announcement is conspicuous for its audacity, given that this court hears few Indian cases and decides little Indian law. I respectfully dissent.

I.

The majority pays only lip service to, but does not heed, the Supreme Court's guidance that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* One manifestation of that maxim is that Indian tribes lack "inherent sovereign authority to exercise criminal jurisdiction over non-Indians." *Id.* at 565 (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978)). Absent express congressional delegation, therefore, store manager Townsend could not have been criminally prosecuted in tribal court for the alleged molestation of John Doe.[1]

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[1] *Cf. Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997) ("As to nonmembers a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

The principle on which *Oliphant* relies, moreover, "support[s] the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* Although the Supreme Court has not yet explicitly adopted an *Oliphant*-like rule for civil cases, it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada v. Hicks,* 533 U.S. 353, 358 n.2 (2001). It remains an open question whether there are *any* circumstances under which the Court would find that a tribal court retains civil jurisdiction over a non-Indian defendant such as Dolgencorp.[2]

The civil action here – an ordinary tort action, despite the seriousness of the alleged offense – comes nowhere close to implicating Indian self-government or internal tribal relations.[3] It is therefore easy to conclude that any putative exception to the well-established restriction on jurisdiction over non-Indian defendants could never extent [sic] to the instant

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[2] *See Hicks,* 533 U.S. at 358 n.2; *see also* Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After* Plains Commerce Bank, 26 ARIZ. J. INT'L & COMP. L. 779, 797 (2009) ("[T]he Court seems to be inching toward an *Oliphant*-like rule based on fairness to nonmembers. ").

[3] The majority's unsupported statement that "the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government" is – in addition to being alarming for its breadth – nothing more than the majority's *ipse dixit.*

facts. Even assuming *arguendo* that the Supreme Court would recognize an exception, the logic and structure of *Montana* dictate that its exceptions apply only where adjudicatory or regulatory authority "is needed to preserve the right of reservation Indians to make their own laws and be ruled by them."[4] The Court recently reiterated the limited nature of tribal-court jurisdiction over nonmember defendants by making explicit that *Montana*'s first exception, like its second, "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations."[5]

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[4] *Strate*, 520 U.S. at 459 (internal quotation marks omitted). Although *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684 (5th Cir. 1999), relied on *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), for the proposition that "civil jurisdiction over nonIndians on reservation lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,'" that presumption was abrogated by subsequent Supreme Court authority. *See Hicks*, 533 U.S. at 381 (Souter, J., concurring) ("[I]n explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana:* that as a general matter, a tribe's civil jurisdiction does not extend to the 'activities of non-Indians on reservation lands,' *Iowa Mutual*, [480 U.S.] at 18 and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana*'s two exceptions.").

[5] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658-59 (2001) (citations and internal quotation marks omitted); *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) ("*Montana* expressly limits its first exception to the 'activities of nonmembers,' 450 U.S., at 565 , allowing these to be regulated to the extent necessary 'to protect

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The majority concedes that "[i]t is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact." I agree: *Montana* and its progeny contemplate a profoundly narrow scope for tribal-court jurisdiction over nonmembers, not least because "the Bill of Rights and the Fourteenth Amendment do not

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tribal self-government [and] to control internal relations,' *id.*, at 564.").

The majority dismisses the relevant language in *Plains Commerce Bank* as *dictum*, but the scholarly consensus agrees that *Plains Commerce Bank* built on a principle articulated in *Montana* and reinforced by its progeny. *See, e.g.*, Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1190 (2010) ("*Hicks* and *Plains Commerce*, like *Strate*, refrained from adopting a categorical prohibition against tribal civil jurisdiction over nonmembers, but further narrowed the circumstances in which the Court will approve such exercises of tribal authority."). Moreover, the claim that court statements that run contrary to one's legal assertions can be ignored or avoided as "*dictum*" or "*dicta*" is often the last refuge when favorable authority is scant. "Even assuming it is dictum, however, we give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court." *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013). The Supreme Court's "recent dictum . . . provides the best, though not infallible, guide to what the law is." *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994). As compared to other *dicta*, "[d]icta of the Supreme Court are, of course, another matter." *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980). In *Gearlds*, a recent panel of this court viewed itself legally bound by Supreme Court *dicta* to the extent that, despite our rule of orderliness, it declared prior Fifth Circuit precedent to have been implicitly overruled by that *dicta*.

of their own force apply to Indian tribes."[6] I also agree with the district court that "in no sense can it reasonably be said that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen[corp] . . . is necessary to protect tribal self-government or control internal relations."[7]

"The *Montana* rule, therefore, and not its exceptions, applies to this case." *Strate*, 520 U.S. at 459. Doe was free to pursue his claims in the state court open to all Mississippi tort claimants. *See id.* Because Dolgencorp's conduct indisputably falls outside the Choctaw Indians' authority to "protect tribal self-government or to control internal relations," *Montana*, 450 U.S. at 544, the jurisdictional inquiry should be easily and rightfully at an end.

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[6] *Hicks*, 533 U.S. at 383 (Souter, J., concurring). As aptly stated by the Chief Justice of the Supreme Court of the Citizen Potawatomi Nation of Oklahoma, Director of the U.C.L.A. American Indian Studies Center, and Co-Director of the Native Nations Law and Policy Center, "Though seemingly capacious, these two exceptions to the so-called *Montana* rule have been construed exceedingly narrowly by subsequent Supreme Court decisions." Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1720 (2012), *excerpted in* IX SCHOLARLY PERSPECTIVES 101 (U.C.L.A. School of Law Fall 2013).

[7] *Dolgen Corp.* [sic] *v. The Mississippi Band of Choctaw Indians*, No. 4:08-CV-22, 2008 WL 5381906, at *3 (S.D. Miss. Dec. 19, 2008); *cf. Strate*, 520 U.S. at 457-58 ("Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.").

This court therefore should reverse the district court and render judgment for Dolgencorp without reaching the first *Montana* exception. I will address it, nonetheless, because I also disagree with the majority that there was a legally sufficient nexus between Dolgencorp's participation in a short-term, unpaid internship program and the full body of Indian tort law.

II.

Before today, no circuit court has upheld Indian-court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant.[8]

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[8] One recent survey reports only four cases upholding tribal-court jurisdiction over a non-member defendant, and just two involving tort law. *See* Krakoff, *supra* note 5, at 1236. In *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002), the court upheld tribal jurisdiction over a tort suit that occurred on a Bureau of Indian Affairs road over which the tribe retained gatekeeping authority. The Ninth Circuit, however, does not acknowledge that *Montana*'s general rule applies to non-Indian conduct on reservation trust land. *See, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813-14, 819 (9th Cir. 2011) (rejecting application of *Montana* but upholding jurisdiction over trespass claim under second exception). Both the Choctaw Supreme Court and the district court *a quo* have ruled, in light of *dicta* in *Hicks* and *Plains Commerce Bank*, that the Ninth Circuit's narrow application of *Montana* is incorrect, a ruling that the tribal defendants do not challenge.

The only decision from a federal circuit that found tribal-court jurisdiction over a tort claim against a non-member defendant is *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927 (8th Cir. 2010), which

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That exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

Assuming "the tribal tort at issue here is a form of regulation," *Plains Commerce Bank*, 554 U.S. at 332, "*Montana*'s consensual relationship exception requires that [it] have a nexus to the consensual relationship itself," *Atkinson*, 532 U.S. at 656. The relevant consensual relationship is Dolgencorp's voluntary participation in the Youth Opportunity Program. The majority errantly contends that, "[h]aving agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would

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involved *Montana*'s second exception. The court found that defendants' outrageous alleged conduct – "API's armed agents entered onto tribal trust land without permission of the elected governing body, stormed buildings vital to the Tribe's economy and its self government, committed violent torts against tribal members, forcibly seized sensitive information related to the Tribe's finances and gaming operations, and damaged tribal property" – "menace[d] the 'political integrity, the economic security, [and] the health [and] welfare' of the Tribe to such a degree that it 'imperil[ed] the subsistence' of the tribal community.'" *Id.* at 939 (quoting *Plains Commerce Bank*, 554 U.S. at 341 (alterations in original)). In *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013), the court invoked *Montana*'s first exception in denying a preliminary injunction against Indian court jurisdiction over an unexhausted tort claim, but the court postponed "a definitive resolution of the question."

hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment."

That reasoning is foreclosed by *Plains Commerce Bank*, 554 U.S. at 338. There is no reason Dolgencorp should could reasonably have anticipated that, *solely on the basis of its participation in a short-term, unpaid internship program,* it would be subject to the entire – and largely undefined – body of Indian tribal tort law. As the Supreme Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not in for a penny, in for a Pound." *Id.* (citation and internal quotation marks omitted).

The elements of Doe's claims under Indian tribal law are unknown to Dolgencorp and may very well be undiscoverable by it.[9] Choctaw law expressly incorporates, as superior to Mississippi state law, the "customs . . . and usages of the tribes." CHOCTAW TRIBAL CODE § 1-1-4. "Where doubt arises as to the customs

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[9] Even for the tribes and their members, the status of the law may be unknowable in light of *Montana* and the tribal reliance on custom and practice, "leaving tribes to wonder as to the scope of tribal civil jurisdiction over nonmembers operating on non-Indian lands within Indian Country." Riley, *supra* note 6, at 1720. *Accord* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law,* 119 HARV. L. REV. 431, 435 (2005) ("Even the Chief Justice of the North Dakota Supreme Court recently said that, 'in matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is.'").

and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages." *Id.* Although the claims that Doe wishes to press against Dolgencorp have familiar state-law analogues, the majority's aggressive holding extends to the entire body of tribal tort law – including any novel claims recognized by the Choctaws but not by Mississippi. *Cf. Plains Commerce Bank*, 554 U.S. at 338.

Because Dolgencorp could not have anticipated that its consensual relationship with Doe would subject it to any and all tort claims actionable under tribal law, there is an insufficient nexus to satisfy *Montana*'s first exception. For the majority to hold otherwise raises serious due-process concerns insofar as Dolgencorp will be forced to defend Doe's claims in an unfamiliar forum without the benefit of constitutional protections.[10]

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[10] Justice Souter explained this serious due-process concern as follows:

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of

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Even accepting as accurate that, in the majority's words, "[i]t is surely within the tribe's regulatory authority to insist that [Doe] not be sexually assaulted by the employees of [Dolgencorp]," it cannot be true that, as the majority insists, "[t]he fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference." Although "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate,* 520 U.S. at 453, it does not necessarily follow that the two are coextensive. There are good reasons to construe the former more narrowly: *Montana*'s first exception envisages discrete regulations consented to *ex ante;* the majority, to the contrary, upholds an unprecedented after-the-fact imposition of an entire body of tort law based on Dolgencorp's participation in a brief, unpaid internship program.

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analogous safeguards enforceable in tribal courts, "the guarantees are not identical," and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot.'" In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant,* namely, an overriding concern that citizens who are not tribal members be "protected from unwarranted intrusions on their personal liberty."

Hicks, 533 U.S. at 383-84 (Souter, J., concurring) (citations omitted).

And finally, the majority's pronouncement is vague and unworkable in practice. On the one hand, the majority opines that "[h]aving agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment." That broad statement would authorize a tort action in Indian court if, for example, the minor had slipped on a poorly-maintained floor at the store and had cut his finger. In the majority's words, that would violate "the safety of the child's workplace."

On the other hand, the majority emphasizes that "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business." Is the majority recognizing tribal-court authority over any tort related to the voluntary job-training program, or only over especially despicable incidents such as sexual assaults? What if the boy had fatally hit his head on the floor? Or would it have to be an intentional tort – a slap on the face, perhaps, for bad performance? Is the majority's unprecedented expansion of Indian-court jurisdiction limited to only highly reprehensible acts, or only to "really bad" acts, or to "sort of bad acts," or to any minor, negligent act, or only to situations in which, in the majority's words, "the tribe is protecting its own children on its own land?

The limits to the majority's dramatic holding remain a secret. In short, the majority gives no real

indication of what it means by foreseeability, which means that the next actor in the place of Dolgencorp will have no idea whether it can be subjected to the uncertainties of the Indian courts.[11]

III.

Although Dolgencorp failed to assert timely that the tribal court lacks jurisdiction to adjudicate Doe's claim of negligent hiring, training, and supervision – because Doe failed adequately to allege and prove that the conduct underlying that claim occurred on the reservation – I would not stop there, as the majority does. This case presents the sort of "extraordinary circumstances" that justify considering a claim presented for the first time on appeal. *See N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916 (5th Cir. 1996).

"Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *Id.* The issue raised by Dolgencorp is a pure question of law that requires no factual development in the district court. Whether its argument is waived

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[11] The majority's facile statement that "under the facts of this case, we need not reach the hypothetical factual scenarios posited by the dissenting opinion" is a duck, not an answer. The majority suggests no test by which future parties in Dolgencorp's circumstance can possibly know when they might be hauled into Indian court pursuant to a consensual relationship" such as the apprentice program.

turns on whether it has met its burden to show that a miscarriage of justice would result from the panel's failure to consider it. *See AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009).

To identify a miscarriage of justice, "we have often considered whether the alleged error is obvious or merely debatable." *Id.* at 701. In this case, the alleged error is obvious. As the majority notes, "*Montana* and its progeny permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis added). *Montana* contains an exception for "civil jurisdiction over non-Indians *on their reservations*." *Id.* at 329 (emphasis added). The Court has given no hint that tribal jurisdiction extends to activity taking place outside of Indian country, as did the hiring, training, and supervision here.[12]

Failure to consider the argument regarding off-reservation conduct causes significant harm to Dolgencorp and does violence to the law. *Cf. AG Acceptance*, 564 F.3d at 701. Dolgencorp will be required, without

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[12] *See also Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries."); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) ("[N]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*."). *But see DISH Network*, 725 F.3d at 883-85.

usual procedural and constitutional protections and in an unfamiliar forum, to defend its off-reservation training, hiring, and supervision procedures. The majority opinion also has profound implications for the due-process rights of other non-Indians who do business on Indian lands in Mississippi, Louisiana, and Texas. The majority's conclusion is flawed, because the Indian court lacks jurisdiction over Doe's claim of negligent hiring, training, and supervision.

As already explained, the Indian court also lacks jurisdiction over the on-reservation conduct for which Doe seeks to hold Dolgencorp vicariously liable, because the conduct does not threaten Indian self-government, nor is there a foreseeable nexus between the whole body of tribal tort law and Dolgencorp's voluntary participation in a brief internship program. The majority's stunning pronouncement expands Indian-court jurisdiction over nonmember defendants far beyond the scope permitted by the Supreme Court or any other appellate authority. It is grave error from which I respectfully dissent.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

DOLGENCORP INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND, **Plaintiffs,** **VERSUS** **THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (in his official capacity), and JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE** **Defendants.**	**CIVIL ACTION NO. 4:08-cv-22-TSL-JCS**

JUDGMENT

(Filed Jul. 30, 2012)

For written reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be had in favor of Plaintiff Dale Townsend against Defendants The Mississippi Band of

Choctaw Indians, the Tribal Court of the Mississippi band of Choctaw Indians, the Honorable Christopher A. Collins (in his official capacity), and John Doe, a minor, by and through his parents and next friends John Doe Sr. and Jane Doe who are hereby and forever enjoined from further proceeding on their claims against him in the Tribal Court, "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of Defendants The Mississippi Band of Choctaw Indians, the Tribal Court of the Mississippi band of Choctaw Indians, the Honorable Christopher A. Collins (in his official capacity), and John Doe, a minor, by and through his parents and next friends John Doe Sr. and Jane Doe against Plaintiffs Dollar General Corporation and Dolgencorp, LLC dismissing their claims challenging the tribal court's jurisdiction in CV 02-05 pending in that court.

This done and signed this 30th day of July, 2012 at Jackson, Mississippi.

/s/ Tom S. Lee
THE HONORABLE TOM S. LEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DOLGENCORP INC., DOLLAR GENERAL CORPORATION AND DALE TOWNSEND — PLAINTIFFS

VS. CIVIL ACTION NO. 4:08CV22TSL-FKB

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (IN HIS OFFICIAL CAPACITY), AND JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE, SR. AND JANE DOE — DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Dec. 21, 2011)

This cause is before the court on the motion of plaintiffs Dolgencorp Inc. and Dollar General Corporation (Dolgen) for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the separate cross-motions of defendants The Mississippi Bank [sic] of Choctaw Indians, The Tribal Court of the Mississippi Bank [sic] of Choctaw Indians and the Honorable Christopher A. Collins (in his official capacity) (collectively the Tribal defendants), and of John Doe, a minor, by and through his parents and

next friends, for summary judgment. The court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that Dollar General's motion should be denied, and the cross-motions of defendants granted.

Plaintiff Dolgen operates a Dollar General store on trust land on the Choctaw Indian Reservation in Choctaw, Mississippi. Dolgen occupies the premises pursuant to a lease agreement with the Mississippi Band of Choctaw Indians (the Tribe) and a business license issued by the Tribe. At all relevant times, Dale Townsend was employed as a store manager. According to defendants, in 2003, defendant John Doe, a minor tribe member, was molested by Townsend during a time when Doe was assigned to work at the Dollar General store as part of the Tribe's Youth Opportunity Program (TYOP), a work experience program run by the Tribe pursuant to which tribal youth were placed with local businesses to gain work experience. Doe and his parents filed suit in Choctaw Tribal court against Townsend, and against Dolgen, seeking actual and punitive damages. In that action, they seek to hold Dolgen vicariously liable for Townsend's actions and directly liable for its own alleged negligence in the hiring, training and supervision of Townsend.

In the tribal courts, Dolgen's [sic] and Townsend's [sic] challenged tribal jurisdiction. Their challenge was rejected, following which Dolgen instituted the present action seeking a determination that there is no tribal jurisdiction over the Does' complaint. *See*

Williams-Willis v. Carmel Financial Corp., 139 F. Supp. 2d 773, 777 (S.D. Miss. 2001) (tribal courts are to be given first opportunity to determine their own jurisdiction where colorable basis for such jurisdiction exists but federal courts ultimately have jurisdiction to determine the limits of a tribal court's jurisdiction) (citations omitted). Initially, they sought a preliminary injunction against further proceedings in Tribal Court pending a final determination by this court of the Tribal Court's jurisdiction over the Does' claims against them. The court denied that motion based on its conclusion as to the potential for tribal jurisdiction under the *Montana v. United States,* 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), "consensual relationship" exception. *See Dolgen Corp., Inc. v. The Mississippi Band of Choctaw Indians,* Civ. Action No. 4:08cv22TSL-FKB, 2008 WL 5381906, 6 (S.D. Miss. Dec. 19, 2008). Dolgen has now moved for summary judgment, contending that as a matter of law, in light of the Supreme Court's explication of *Montana*'s "consensual relationship" exception in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008), the Tribe cannot establish the existence of tribal jurisdiction over the Does' claims. The Tribe, and separately the Does, oppose plaintiffs' motion, and have moved for summary judgment, contending that the evidence and law establish that the Tribal Court does have jurisdiction over the Does' tort claims under *Montana*'s consensual relationship exception.

Under *Montana,* and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians. *See Montana,* 450 U.S. at 565, 101 S. Ct. 1245 (setting forth "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); *Plains Commerce Bank,* 554 U.S. at 329-30, 128 S. Ct. 2709. This is so because while the tribes have authority to exercise civil jurisdiction over their own members, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana,* 450 U.S. at 564, 101 S. Ct. 1245 (citations omitted). Generally, therefore, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S. Ct. 1245.

The Court in *Montana* identified two exceptions to this general rule against tribal authority over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the economic security, or the health or welfare of the tribe." *Id.* at

566, 101 S. Ct. 1245. The parties agree that under *Montana,* because both Dolgen and Townsend are nonmembers of the Tribe, one of Montana's two exceptions must apply in order for the Tribe to assert regulatory authority over their actions.

In its previous opinion holding the second *Montana* exception inapplicable, the court wrote that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen or Townsend could not reasonably be said to be necessary to protect tribal self-government or control internal relations. *Dolgen,* 2008 WL 5381906 (citing *County of Lewis v. Allen,* 163 F.3d 509, 515 (9th Cir. 1998) (en banc) (observing that "the tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue . . . that the exception applies because the tribe has an interest in the safety of its members.")). While the court's ultimate conclusion that the second exception is not a basis for jurisdiction in this case stands, the court's characterization of the basis for this conclusion was inaccurate. Discussing the second exception, the Court in *Plains Commerce Bank* wrote:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S., at 566, 101 S. Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.*

> One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." *Cohen* § 4.02[3][c], at 232, n.220.

554 U.S. 316, 341, 128 S. Ct. 2709. The tort claims at issue in the case at bar do not fit within this exception. As the court in *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.* observed,

> To some extent, it can be argued that torts committed by or against Indians on Indian land always "threaten[ ] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." [*Montana,* 450 U.S. at 566, 101 S. Ct. 1245]. But this generalized threat that torts by or against its members pose for any society, is not what the second *Montana* exception is intended to capture. *See Atkinson,* 532 U.S. at 657 n. 12, 121 S. Ct. 1825 ("*Montana*'s second exception can be misperceived. The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government." (internal quotations omitted)). Rather, the second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty. *Id.*

569 F.3d 932, 943 (9th Cir. 2009).

In this case, tribal jurisdiction over the Does' claims cannot be sustained under the second *Montana* exception, not because tribal jurisdiction is not necessary to protect tribal self-government or control internal relations, but rather because the nonmember conduct at issue does not "'imperil the subsistence' of the tribal community" and tribal jurisdiction thus cannot be necessary to avert catastrophic consequences.

As to the first *Montana* exception, the court previously indicated that while it appeared a consensual relationship existed between Dolgen and the Tribe and John Doe by virtue of their participation in the Tribal Youth Opportunity Program, it was not clear whether it was the type of consensual relationship contemplated by *Montana*'s first exception. It now appears undisputed that Dale Townsend, purportedly on behalf of Dolgen, agreed with the Tribe to participate in the Tribal Youth Opportunity Program, and that based on such agreement, John Doe was placed in the Dollar General store under Townsend's direct supervision.[1] Doe did not thereby become an

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[1] Dolgen argues that Townsend had no authority to agree to such participation on behalf of the company, and that Dolgen itself did not enter into any such agreement. Defendants contend that Townsend had apparent authority on behalf of Dolgen in this regard, and that in any event, Dolgen ratified this decision. They note, in particular, that evidence shows that other Dolgen supervisors in the Dollar General store were aware of and participated on Dolgen's behalf in supervising other tribal youth who were assigned to the store under the Tribal Youth

(Continued on following page)

employee of Dolgen, but he functioned as an unpaid intern or apprentice, receiving job training from Dolgen and in turn provided free labor to Dolgen for the period of his assignment. In the court's opinion, as a consequence of this arrangement, Dolgen implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship.

The court is further of the opinion that the tort claims which the Does seek to pursue in the Tribal Court, being based on Townsend's alleged molestation of John Doe during his tenure at the store, arise directly from this consensual relationship so that the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority is satisfied. *See Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 656, 121 S. Ct. 1525, 149 L. Ed. 2d 889 (2001) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself").

Notwithstanding this, Dolgen, citing *Plains Commerce Bank,* 554 U.S. 316, 128 S. Ct. 2709, submits that the consensual relationship exception does not support tribal jurisdiction since the nonmember conduct at issue does not implicate tribal governance or internal relations. In *Plains Commerce Bank,* the plaintiff, a non-Indian bank, sold land it

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Opportunity Program. The Tribe made a colorable showing that Townsend at least had apparent authority in this regard.

owned in fee simple on a tribal reservation to non-Indians. An Indian couple who had been leasing the land with an option to purchase, sued the bank in tribal court, contending the Bank discriminated against them by selling the land to nonmembers of the Tribe on terms more favorable than the Bank offered to sell it to them. *Id.* at 321, 128 S. Ct. 2709. After the couple prevailed on their claims in tribal court, the Bank filed suit in district court challenging tribal jurisdiction over the claims. The district court and Eighth Circuit found that tribal jurisdiction was proper under Montana's "consensual relationship" exception, holding that the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members, including a nonmember's sale of fee land. *Id.* at 322-23, 128 S. Ct. 2709. The Supreme Court reversed. The Court characterized the plaintiffs' discrimination claim as challenging "a non-Indian's sale of non-Indian fee land," which it held was beyond the authority of the tribal courts to adjudicate, stating:

> *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, 101 S. Ct. 1245, allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to

> control internal relations," *id.*, at 564, 101 S. Ct. 1245.

Id. at 332, 128 S. Ct. 2709. The Court reasoned that because the subject claim did not involve nonmember *conduct* on fee land but rather involved the *sale* of non-Indian fee land, there was no tribal jurisdiction. *Id.*, 128 S. Ct. 2709. In distinguishing between "sale of the land and conduct on it," the Court referenced

> the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, *see Worcester*, 6 Pet., at 561, 8 L. Ed. 483 (persons are allowed to enter Indian land only "with the assent of the [tribal members] themselves"), "protect[ing] tribal self-government," and "control[ling] internal relations," *see Montana*, 450 U.S., at 564, 101 S. Ct. 1245. The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. *See Hicks, supra*, at 361, 121 S. Ct. 2304 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them"). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the

> tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

Id. at 334-335, 128 S. Ct. 2709. The Court observed that while regulation of fee land sales could not be justified by the tribe's interests in protecting internal relations and self-government,

> This is not to suggest that the sale of the land will have no impact on the tribe. The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, *see supra,* at 2721-2723, the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so.

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." *United States v. Lara,* 541 U.S. 193, 212, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (KENNEDY, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. *See Talton v. Mayes,* 163 U.S. 376, 382-385, 16 S. Ct. 986, 41 L. Ed. 196 (1896). Indian courts "differ from traditional American courts in a number of significant respects." *Hicks,* 533 U.S., at 383, 121 S. Ct. 2304 (SOUTER, J., concurring). And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See Montana,* 450 U.S., at 564, 101 S. Ct. 1245.

Id. at 336-337, 128 S. Ct. 2709.

The parties disagree as to the meaning and import of *Plains Commerce Bank* with respect to the first *Montana* exception. Plaintiffs submit that under the Court's interpretation of the exception in *Plains*

Commerce Bank, no longer will every consensual relationship between a nonmember and a tribal member occurring on the reservation be sufficient to establish tribal jurisdiction over claims with a nexus to that relationship; rather, only those consensual relationships that are evaluated and determined to have an impact on tribal self governance or internal relations will trigger tribal jurisdiction.[2] Plaintiffs contend that since the consensual relationship here involved does not implicate tribal self governance or internal relations, then the exception does not apply and there can be no basis for tribal jurisdiction.

Defendants, on the other hand, maintain that nothing in *Plains Commerce Bank* altered the basic *Montana* framework and that to establish applicability

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[2] As defendants note, several commentators have interpreted *Plains Commerce Bank* as likely narrowing the scope of the consensual relationship exception. *See, e.g.*, Paul A. Banker and Christopher Grgurich, *The Plains Commerce Bank Decision And Its Further Narrowing Of The Montana Exceptions As Applied To Tribal Court Jurisdiction Over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565, 586-589 (2009-2010) ("The opinion appears to narrow the Montana exceptions by interpreting them with language that tends toward a more limited reading of the text of the exceptions."); Lisa M. Slepnikoff, *More Questions Than Answers: Plains Commerce Bank v. Long Family Land And Cattle Company, Inc. And The U.S. Supreme Court's Failure To Define The Extent Of Tribal Civil Authority Over Nonmembers On Non-Indian Land*, 54 S.D. L. Rev. 460 (2009) ("The Court's questionable interpretation of *Montana v. United States* may remove from tribal jurisdiction case which, under a traditional interpretation of Montana, would have been within a tribe's authority to adjudicate.").

of the consensual relationship exception, no showing is required to be made beyond the existence of the consensual relationship which supports a finding of consent to tribal jurisdiction, and the nexus between the consensual relationship and exertion of tribal authority. According to defendants, it is implicit in *Montana* and its progeny that the right of Indian tribes to self governance includes the right to adjudicate civil disputes arising from voluntary consensual relationships between tribes and their members and nonmembers. That is, disputes arising from member-nonmember or tribe-nonmember consensual relationships are deemed as a matter of law to impact tribal rights of self-government sufficient to permit the exercise of tribal court jurisdiction to adjudicate such disputes. The key point underlying this *Montana* exception is that it is a core attribute of tribal sovereignty and critical to the survival of tribal governments and to tribal self-government that tribes retain authority to adjudicate civil disputes arising from voluntary consensual relationships between tribes and tribal members and nonmembers on their reservations (and especially so where the challenged conduct occurs on trust lands). The exception, they submit, does not ask whether depriving a particular tribal court of jurisdiction to adjudicate a particular dispute arising from a particular consensual relationship would interfere with the tribe's right of self government, but whether depriving a tribe's courts of such jurisdiction in general to resolve such disputes would undermine that tribe's right of self government.

In the court's opinion, defendants have the better of this argument. *Montana* identified nonmembers' consensual relationships with tribes and their members, which involve conduct on the reservation (and particularly on Indian trust land), as a circumstance that warrants tribal civil jurisdiction over matters arising from those relationships.[3] *Montana* reflects a legal presumption that it would materially undermine

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[3] Notably, although a number of post-*Plains Commerce Bank* cases have considered the consensual relationship exception, none has identified the additional showing advocated by plaintiffs as a prerequisite to its application. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 (9th Cir. 2011) (finding tribe had authority under first exception to regulate nonmembers' activities on reservation based on long-term business lease with tribe for use of prime tribal riverfront property; fact that business venture itself constituted a significant economic interest for the tribe supported jurisdiction under second exception as well); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2011) (post-*Plains Commerce Bank* case holding that "consensual relationship" may establish tribal court jurisdiction under *Montana* "if there is a sufficient 'nexus' between that relationship and the attendant exertion of tribal authority' "); *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 941 (8th Cir. 2010) (with respect to consensual relationship exception, identifying "operative question for jurisdictional purposes [as] whether the conversion claim has a sufficient nexus to the consensual relationship between" nonmember and tribe); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941-942 (9th Cir. 2009) (stating that "mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts").

tribal rights of self-government to deprive tribal courts of jurisdiction in general as an exercise of tribal sovereignty to adjudicate such claims. In this case, a consensual relationship exists; and the claims at issue arise from that relationship. Accordingly, the court concludes that the Tribe has sufficiently demonstrated applicability of the first *Montana* exception and thus the existence of tribal jurisdiction.[4]

Therefore, it is ordered that Dolgen's motion for summary judgment is denied, and defendants' motions for summary judgment are granted.

SO ORDERED this 21st day of December, 2011.

/s/ Tom S. Lee
UNITED STATES DISTRICT COURT

[4] Dolgen has made a number of arguments relating to causation, liability and damages which the court views as bearing on the merits, not jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DOLGEN CORP., INC.,
DOLLAR GENERAL CORPORATION
AND DALE TOWNSEND PLAINTIFFS

VS. CIVIL ACTION NO. 4:08CV22TSL-JCS

THE MISSISSIPPI BAND OF
CHOCTAW INDIANS, THE TRIBAL
COURT OF THE MISSISSIPPI BAND
OF CHOCTAW INDIANS, THE
HONORABLE CHRISTOPHER A. COLLINS
(IN HIS OFFICIAL CAPACITY), AND
JOHN DOE, A MINOR, BY AND
THROUGH HIS PARENTS AND
NEXT FRIENDS JOHN DOE SR.
AND JANE DOE DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Dec. 19, 2008)

This cause is before the court on the separate motions of plaintiffs Dollar General Corporation and Dolgen Corp., Inc. (Dolgen) and of Dale Townsend, for temporary restraining order and preliminary injunction to enjoin all defendants from taking any further steps in the prosecution of the Doe defendants' pending lawsuit against them in the Tribal Court of the Mississippi Band of Choctaw Indians. Defendants, the Mississippi Band of Choctaw Indians, the Tribal Court of the Mississippi Band of Choctaw Indians and the Honorable Christopher A. Collins (in his

official capacity as judge of the Tribal Court) (collectively the Tribal defendants), have filed their response in opposition to plaintiffs' motions, and the Doe defendants have separately responded. The court, having considered the memoranda and supplemental memoranda of authorities submitted by the parties, together with attachments, concludes that the motion of Dolgen and Dollar Tree should be denied, and the motion of Townsend should be granted.

Plaintiff Dolgen operates a Dollar General store on trust land on the Choctaw Indian Reservation in Choctaw, Mississippi. Dolgen occupies the premises pursuant to a lease agreement with the Mississippi Band of Choctaw Indians (the Tribe) and a business license issued by the Tribe. At all relevant times, plaintiff Dale Townsend was employed as the store's manager. In or prior to 2003, the Tribe implemented a Tribal Youth Opportunity Program, described as a tribal work experience program pursuant to which tribal youth are placed with local businesses to gain work experience. According to the Tribe, pursuant to the program, the Tribe requested that Dolgen allow a juvenile tribe member to be placed at its store. Dolgen agreed, and allowed John Doe, a minor, to be placed in the store, and according to the Tribe and Doe defendants, Dolgen agreed it would supervise, control and report to the Tribe on John Doe's work at the store. Doe and his parents subsequently charged that in July 2003, Townsend, the manager, molested the minor John Doe while Doe was working there.

Based on the Does' allegation, counsel for the Tribe met with Townsend and advised the Tribe would be seeking an order of exclusion from the Tribal Court to permanently bar Townsend from coming onto the reservation for any purpose. Townsend agreed he would consent to entry of such an order, allegedly based on representations by the Tribe's counsel that no further legal proceedings would be brought against him based on John Doe's allegations. However, on January 6, 2005, Doe and his parents filed suit in the Choctaw Tribal Court against Townsend, and against Dollar General and Dolgen (collectively Dolgen) seeking to recover actual and punitive damages. In that action, the Does seek to hold Dolgen vicariously liable for Townsend's actions, and further allege that Dolgen is liable for its own negligence in the hiring, training and supervision of Townsend.

In the face of a challenge by plaintiffs herein, the Tribal Court concluded that it had jurisdiction over the Does' complaint. The ruling was appealed to the Tribal Supreme Court, and was affirmed. Once the issue of tribal jurisdiction was exhausted in the tribal court system, Dolgen and Townsend brought the present action in this court seeking a determination that there is no tribal jurisdiction over the Does' complaint. The case is now before the court on Dolgen's and Townsend's separate motions to preliminarily enjoin further proceedings in the Tribal Court pending a final determination by this court of the

Tribal Court's jurisdiction over the claims against them.

To prevail on a motion for preliminary injunction, a plaintiff must establish each of four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury; (3) that the threatened injury outweighs any harm the injunction might cause the defendant; and (4) that an injunction is not contrary to the public interest. *Hoover v. Morales,* 164 F.3d 221, 224 (5th Cir. 1998). The first issue, then, is whether plaintiffs have demonstrated a substantial likelihood of success on the merits of their assertion that the Tribal Court lacks jurisdiction over the Does' lawsuit.

Under the tribal exhaustion doctrine, subject to limited exceptions, tribal courts are to be given the first opportunity to determine the extent of their own jurisdiction where there is a colorable basis for tribal jurisdiction. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985); *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987). However, the federal courts ultimately have jurisdiction to determine the limits of a tribal court's jurisdiction. *Williams-Willis v. Carmel Financial Corp.,* 139 F. Supp. 2d 773, 777 (S.D. Miss. 2001) (citing *Iowa Mutual,* 480 U.S. at 14, 107 S. Ct. at 976, and *Strate v. A-1 Contractors,* 520 U.S. 438, 451, 117 S. Ct. 1404, 1411, 137 L. Ed. 2d 661 (1997)). Therefore, "[n]on-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to

challenge tribal court jurisdiction." *Boozer v. Wilder,* 381 F.3d 931, 934 (9th Cir. 2004). "When reviewing a tribal court decision regarding tribal jurisdiction, this court reviews the tribal court's finding of facts for clear error and reviews questions of law de novo." *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1313-14 (9th Cir. 1990); *see also Mustang Production Co. v. Harrison,* 94 F.3d 1382, 1384 (10th Cir. 1996).

"In the absence of congressional legislation, . . . tribal governments retain regulatory authority over all matters falling within their inherent sovereignty." *McArthur v. San Juan County,* 497 F.3d 1057, 1068 (10th Cir. 2007). In *Montana v. United States,* 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), the Supreme Court set forth the "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565, 101 S. Ct. 1245, This is the "main rule" of *Montana.* The Court identified two exceptions to this general rule against tribal authority over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political

integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S. Ct. 1245.[1] Under the *Montana* analysis, therefore, because both Dolgen and Townsend are nonmembers of the Tribe, one of *Montana*'s two exceptions must apply in order for the Tribe to assert regulatory authority over their actions. The Tribal Court concluded that both exceptions applied.

In the court's opinion, the conclusion of the Tribal Court that *Montana*'s second exception, the "self governance" exception, applies, is not supportable. The Choctaw Supreme Court reasoned that this exception applies because "if the tribe cannot protect the health and welfare of its members by insuring the

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[1] The Tribe and the Does had argued in the Tribal Court that because the activities at issue in the Doe litigation occurred on Indian land, the *Montana* rule and its exceptions had no relevance, and that claims relating to the activities of nonmembers on tribal lands were instead governed by the rule that tribal courts presumptively have jurisdiction over what occurs on tribal land. *See Williams v. Lee,* 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). The Choctaw Supreme Court concluded otherwise, and held that the *Montana* rule with its exceptions does apply to the activities of nonmembers even on tribal lands, so that one of the *Montana* exceptions must apply in order for the tribal courts to have jurisdiction for claims arising on reservation lands. Although the Tribe and Does maintain that this issue was in doubt following the Supreme Court's decision in *Nevada v. Hicks,* 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), they now concede, in light of the Court's recent decision in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.,* 128 S. Ct. 2709 (2008), that *Montana* applies to Indian and non-Indian land alike.

availability of a Tribal forum for disputes when it places a Tribal minor with a non-Indian commercial venture, who is on the Reservation solely as a result of a commercial lease with a Tribal entity, then this exception essentially becomes meaningless."

"Although broadly framed, [the second *Montana*] exception is narrowly construed." *County of Lewis v. Allen,* 163 F.3d 509, 515 (9th Cir. 1998) (en banc). This exception recognizes that Indians have "the right to make their own laws and be ruled by them" and thus "tribal assertion of this authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Nevada v. Hicks,* 533 U.S. 353, 361, 121 S. Ct. 2304, 2311 (2001). By way of example, "[t]he exception authorizes a tribe to do such things as punish tribe members, regulate their domestic relations and promulgate rules regarding tribal membership or inheritance within the tribe." *Bugenig v. Hoopa Valley Tribe,* 229 F.3d 1210, 1220 (9th Cir. 2000) (citing *Strate,* 520 U.S. at 459, 117 S. Ct. 1404).

As one court has observed, "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe," and yet the second *Montana* exception obviously "was not meant to be read so broadly" as to cover every act that occurs on the reservation. *Allen,* 163 F.3d at 515. Instead, "when read 'in its proper context,' the exception allows for tribal jurisdiction only to the extent that such authority 'is necessary to protect self-government or to

control internal relations.'" *Bugenig*, 229 F.3d at 1220 (citing *Allen*). *See also Allen*, 163 F.3d at 515 (observing that "the tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue . . . that the exception applies because the tribe has an interest in the safety of its members."). In the case at bar, in no sense can it reasonably be said that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen or Townsend is necessary to protect tribal self-government or control internal relations. Manifestly, this is a far broader application of *Montana*'s second exception than is warranted.

Turning to the first *Montana* exception, the Tribal Court identified three bases for finding a consensual relationship which it concluded supported an exercise of jurisdiction over both Dolgen and Townsend. The first was Dolgen's lease agreement with the Tribe, in which Dolgen expressly consented to Tribal Court jurisdiction over matters relating to the lease. The second was Dolgen's business license, issued to Dolgen by the Tribe. The third was Dolgen's alleged agreement to allow John Doe to be placed in the Dollar General store as part of the Tribe's Youth Opportunity Program.

As for Dolgen, the first putative "consensual relationship" identified by the Tribal Court, namely Dolgen's lease with the Tribe, is not a basis for tribal jurisdiction. The consensual relationship exception requires more than that there just be a consensual relationship; the relationship must occur "through

commercial dealing, contracts, leases, or other arrangements," *and* there must be a direct logical relationship between the consensual relationship and the injury. The parties to the lease agreement, Dolgen and the Tribe, expressly agreed that "[the lease] agreement and any related documents" would be construed according to the Choctaw Tribal Code and that "exclusive venue and jurisdiction shall be in the Tribal Court." However, the injury here did not arise out of the lease agreement between Dolgen and the Tribe. As Dolgen correctly points out, "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S. Ct. 1525 (2001), and thus, "[a] nonmember's consensual relationship in one area . . does not trigger tribal civil authority in another – it is not 'in for a penny, in for a pound,'" *id.* (citations omitted).

In the court's opinion, the same is true of the business license proposition; the required nexus is lacking. The Tribal Court wrote:

> It strains credulity to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.

Simply because an injury occurred on the premises of the business for which the license was granted is not

a basis for concluding that the licensee impliedly consented to tribal jurisdiction. This is a more expansive assertion of tribal jurisdiction than *Montana*'s "consensual relationship" will countenance.

The Tribal Court also concluded there was a consensual employment-type relationship between Doe and Dolgen, i.e., that John Doe was effectively an employee, and that this relationship qualifies as a consensual relationship supporting tribal jurisdiction. The court reasoned as follows:

> [T]here is also an (unwritten) consensual agreement between the Tribe and Dollar General. The essence of such an agreement being that when the Tribe places a Tribal minor with Dollar General for job training purposes, that it would be mutually understood that any issues relative to Dollar General's relationship to the minor regarding such things as training, wages or potential harm would be resolved in Tribal court.

Dolgen objects that it had no such understanding, and it maintains there is no evidence in the record to support a conclusion that there was any agreement between Dolgen and the Tribe for placement of minors for training or as to the nature of John Doe's placement and what it entailed.

On the other hand, consistent with the Tribal Court's ruling, the Tribe and Does herein argue that both John Doe and the Tribe had entered into voluntary consensual relationships with Dolgen within the meaning of *Montana*'s consensual relationship

exception based on John Doe's status as a student intern or apprentice working under the supervision and control of the Dollar General store and its designated supervisor, Townsend. Defendants note that this arrangement arose from Dolgen's voluntary agreement to accept placement of the minor tribal member on its premises as part of the Tribal Youth Opportunity Program and to assign Townsend to act as his supervisor in carrying out the minor's work and the minor's agreement to accept that placement. The Tribe and Does suggest that this arrangement was the type of commercial or "other arrangement" that fits squarely within *Montana*'s consensual relationship exception.

In *Macarthur v. San Juan County,* the Tenth Circuit held that "*Montana*'s consensual relationship exception applies to a nonmember who enters into an employment relationship (on Indian lands) with a member of the tribe." 497 F.3d 1057, 1071 (10th Cir. 2007).[2] *Cf. Plains Commerce Bank,* 128 S. Ct. at 2723

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[2] The court also recognized that the regulatory (and hence adjudicatory) authority of tribes, at least that which is derived solely from their inherent sovereignty, is limited to the reservation's borders. *Macarthur v. San Juan County,* 497 F.3d 1057, 1071 (10th Cir. 2007) (citations omitted). The court wrote:

> The notion that inherent sovereignty ceases at the reservation's borders is consistent with the Court's statement in [*United States v. Wheeler,* 435 U.S. 313, 326, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)], that "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external

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(observing that "[t]he logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) . . . may intrude on the internal relations of the tribe or threaten tribal self-rule"). Dolgen acknowledges that John Doe may qualify as an employee for some purposes, as for example, workers' compensation coverage. *See Walls v. North Mississippi Medical Center & U.S. Fidelity & Guar. Co.*, 568 So. 2d 712, 713 (Miss. 1990) (individual participating in student intern program and performing services in defendant hospital, at the direction of the hospital's nurses, was an apprentice employee of the hospital law for purposes of workers' compensation benefits). It submits, however, that he was not really an employee in the sense of there being a genuine consensual employment relationship.[3]

> relations." 435 U.S. at 326, 98 S. Ct. 1079. It would simply strain credulity to hold that the Navajo Nation may exercise regulatory authority over any employer in the United States so long as the individual or entity employs an enrolled member of the tribe. Therefore, we hold that a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation.

Id. at 1071-1072.

[3] Dolgen also argues that for the consensual relationship exception to apply, there must have been an express consent to tribal jurisdiction. However, there is no such requirement. *See Plains Commerce Bank*, 128 S. Ct. 2724 ("Consequently, (tribal) laws and regulations may be fairly imposed on nonmembers only

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Rather, the Tribal Youth Opportunity Program in which John Doe participated, was nothing more than "a civic program designed by the Tribe for the benefit of the Tribe, not Dollar General, through the provision of job training to its younger members." The Tribe and the Does, on the other hand, argue that "Dollar General financially benefitted from its decision to participate in the Tribe's Youth Opportunity Program by receiving work from John Doe that Dollar General didn't have to pay for."

If John Doe performed services for Dolgen that had value to Dolgen such that Dolgen enjoyed a commercial benefit from its agreement to allow his placement in its store, then it would be reasonable to conclude that there existed the kind of consensual relationship required by *Montana*'s first exception. In the court's opinion, the fact that he was not in a traditional employment relationship is not necessarily determinative. If, on the other hand, Dolgen has accurately portrayed the arrangement as its merely gratuitously allowing the Tribe to place John Doe for the benefit of the Tribe and John Doe, not Dolgen, through the provision of job training, then one would

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if the nonmember has consented, either expressly or by his action"). What is instead required is that the circumstances of the parties' relationship manifest at least an implied consent to tribal jurisdiction. *See Plains Commerce Bank, supra*; *Atkinson Trading Co., Inc. v. Manygoats*, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, 8 (D. Ariz. March 17, 2004) (*Montana* requires consent to jurisdiction, either expressed, or implied by the parties' behavior ").

be hard pressed to find the kind of "commercial dealing, contract, lease or other (similar) arrangement"[4] contemplated by *Montana*'s first exception. *See County of Lewis v. Allen,* 141 F.3d 1385 (9th Cir.) ("[T]he 'consensual relationships with the tribe or its members' addressed by this exception – 'commercial dealing, contracts, leases, or other arrangements,' – are generally commercial relationships entered into by the nonmember in order to obtain some benefit from the tribe or tribal member."), *vacated on other grounds,* 149 F.3d 1228 (9th Cir. 1998).

It is clear that John Doe was not a paid employee of the Dollar General store, but was instead an intern or apprentice of some sort. It is also undisputed that a purpose of his placement at the Dollar General store was so that he could receive job training of some sort, or perhaps at least be exposed to a work environment. The more pertinent issue for jurisdictional purposes, however, is whether John Doe actually performed or was expected to perform services that benefitted Dolgen, i.e., whether Dolgen's participation was essentially gratuitous or whether it received a commercial benefit from the arrangement.

Dolgen argues that there is no evidence in the record to support the Tribal Court's conclusion that this was a consensual employment relationship, or its

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[4] The "other arrangement" to which the exception refers must also be of a commercial nature. *See Boxx v. Long Warrior,* 265 F.3d 771, 776 (9th Cir. 2001).

explicit conclusion that the parties would have mutually understood from the nature of their relationship that "any issues relative to Dollar General's relationship to the minor regarding such things as training, wages or potential harm would be resolved in Tribal court. . . ." Dolgen concludes that because there is no such evidence, there is no basis upon which this court may conclude that the Tribal Court has properly assumed jurisdiction over the case. However, as defendants point out, the Tribal Court's decision was rendered in the context of a motion to dismiss in which the court accepted as true the Does' jurisdictional allegations, including those relating to John Doe's employment-type relationship with Dolgen. There is nothing to indicate that Dolgen challenged the Does' factual allegations or that it undertook to show that the relationship was not mutually beneficial to all the parties, including Dolgen – nor has it done so here.

Dolgen is now before this court seeking to enjoin the Tribal Court's exercise of jurisdiction, and it is thus Dolgen's burden to establish a substantial likelihood of success on the merits of its own assertion that the Tribal Court lacks jurisdiction. The burden is thus on Dolgen to demonstrate that the *Montana* exception does not apply. Under the circumstances, Dolgen cannot sustain that burden solely by

reliance on the absence of evidence in the Tribal Court record.[5]

Dolgen argues additionally and/or alternatively that even if its alleged arrangement with the Tribe and John Doe could be legitimately considered a consensual relationship under *Montana,* there still is no basis for tribal jurisdiction because the tort that is the subject of the Does' complaint did not arise out of the putative consensual relationship between Dolgen and the Tribe or John Doe. As this argument suggests, "[t]he existence of a consensual relationship is not alone sufficient to support tribal jurisdiction. The tribal exercise of authority must also take the form of taxation, licensing, or 'other means' of regulating the activities of the nonmember, and this regulation must have some nexus to the consensual relationship." *Farmers Union Oil Co. v. Guggolz,* No. CIV 07-1004, 2008 WL 216321, 4-5 (D.S.D. Jan. 24, 2008). Thus, as

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[5] The Tribe and Does have also argued that regardless of whether Dolgen expected to derive a direct benefit in the form of services from John Doe as part of its agreement to allow John Doe's placement in its store (in other words, that even if the arrangement was intended only to provide job training to John Doe and not necessarily for Dolgen to receive the benefit of work performed by John Doe), Dolgen still derived what may fairly be considered a commercial benefit from the relationship as a result of the good will or "good publicity" it experienced on the reservation and with members of the Tribe on account of its participation in the Tribal Youth Opportunity Program. In the court's opinion, this is far too tenuous a commercial benefit to support the conclusion that *Montana*'s consensual relationship applies.

the Supreme Court made clear in *Strate*, *Montana*'s consensual relationship exception does not apply to a purely accidental encounter between two strangers but requires a nexus between a preexisting consensual commercial relationship between the parties and the personal injury claim. *See Plains Commerce Bank*, 491 F.3d at 886-87, *rev'd on other grounds*, 128 S. Ct. 2709. *See also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). Here, notwithstanding Dolgen's argument to the contrary, the court is of the opinion that the subject matter of the Does' lawsuit, at least to the extent the Does charge that Dolgen was itself negligent in the hiring, training and supervision of Townsend, arises directly from Dolgen's consensual relationship with the Tribe and John Doe.

Based on the foregoing, the court concludes that Dolgen has failed to demonstrate a substantial likelihood of success on the merits of its assertion that the Tribal Court lacks jurisdiction over the Does' lawsuit and therefore, Dolgen's motion for preliminary injunction will be denied.

A contrary result is reached as to Dale Townsend. As Townsend notes in his own motion for injunctive relief, each of the putative consensual relationships identified by the Tribal Court was a consensual relationship between the Tribe and the Does *with Dolgen*. None involved a consensual relationship

between the Tribe or the Does *and Townsend.* He concludes, therefore, that the Tribal Court has no jurisdiction over him. The court agrees.[6]

In *Macarthur v. San Juan County,* 497 F.3d 1057 (10th Cir. 2007), the court concluded that while the claims of two tribal members against their employer, the San Juan County Health Services District (SJHSD), was a consensual relationship under the first *Montana* exception so that the tribal court had jurisdiction over the employee's claim against SJHSD. The court held, however, that tribal jurisdiction was lacking over the employees' claims against a number of other defendants (employees of the SJHSD) because the plaintiffs contractual employment relationships were with the SJHSD only; the plaintiffs "did not enter into a contractual employment relationship with any other Defendant." The court wrote:

> While some of the Defendants admittedly played a tangential role in SJHSD's employment relationships with the two, none of the Defendants, other than SJHSD, entered into the type of consensual relationship with Mr. Riggs or Mr. Dickson sufficient to fall within the exception. In other words, it is

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[6] Townsend also argues that the order of exclusion entered by the Tribal Court waived any jurisdiction the Tribe may otherwise have had over Townsend and that the Tribe is now estopped from attempting to assert jurisdiction over him. The court finds it unnecessary to address this argument.

> self-evident that none of them entered into "commercial dealing, contracts, [or] leases" with either [plaintiff]. *And being one's coworker or superior standing alone cannot possibly constitute the type of "other arrangements" the Supreme Court had in mind in Montana.* If those relationships were sufficient, "the exception would swallow the rule." *Atkinson Trading Co.*, 532 U.S. at 655, 121 S. Ct. 1825.

497 F.3d at 1072. This reasoning applies equally here. There is no conceivable basis upon which the Tribal Court may exercise jurisdiction over the claims against Townsend, and accordingly, all defendants will be permanently enjoined from further proceeding against him in the Tribal Court.[7]

Based on the foregoing, it is ordered that Dolgen's motion for temporary restraining order and/or preliminary injunction is denied. It is further ordered that inasmuch as the absence of Tribal Court jurisdiction over Dale Townsend is manifest, defendants are enjoined from further proceeding on their claims against him in the Tribal Court.

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[7] While Townsend has moved only for a preliminary injunction and thus would normally be required to establish each of the four elements for securing preliminary injunctive relief, *see supra* 3-4, defendants herein have no basis for objecting to a final determination by this court of this jurisdictional issue, as they themselves requested in their response that the court decide the issue on the merits.

SO ORDERED this 19th day of December, 2008.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

No. CV-02-05

JOHN DOE, JR., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOHN DOE, SR. AND JANE DOE, Plaintiff/Appellee VS. DOLLAR GENERAL CORPATION [sic]; DOLGENCORP, INC.; AND DALE TOWNSEND, INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH DOLLAR GENERAL CORPORATION AND DOLGENCORP, INC., Defendants/Appellants	MEMORANDUM OPINION AND ORDER (Filed Feb. 8, 2008)

(Per Curiam Chief Justice Rae Nell Vaughn and Associate Justices Roseanna Thompson and Frank Pommersheim)

I. Introduction

The Plaintiff John Doe was thirteen years old in the summer of 2003. At that time, as a member of the Mississippi Band of Choctaw Indians Tribe and participant in the Tribe's Youth Opportunity Program, he was assigned to the Dollar General Store in the Choctaw Town Center in order to gain experience and to learn work skills. John's supervisor at Dollar General was Mr. Dale Townsend, a non-Indian adult, who resided outside the Reservation in Philadelphia, Mississippi.

During this time period, Dollar General was engaged in retail business at this store pursuant to a commercial lease wherein Dolgencorp, a non-resident foreign corporation, leased store space from Choctaw Shopping Center Enterprise, a wholly-owned entity of the Mississippi Band of Choctaw Indians. The leased premises are located completely within the exterior boundaries of the Mississippi Band of Choctaw Indian Reservation and are located on land owned by the Tribe and held in trust by the United States government for the benefit of the Tribe. In addition, at all relevant times herein, Dollar General possessed a valid Tribal business license, which permitted it to engage in commercial activities within the Choctaw Reservation. Such business license is required by § 14-1-3(1) of the Tribal Code.[1]

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[1] Section 14-1-3(1) of the Tribal Code provides:

Any person who engages in any business or activity on reservation lands should apply to the commissioner

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It is alleged, that during the time of John Doe's placement by the Tribe at the Dollar General Store, Mr. Dale Townsend made repeated and unsolicited sexual advances toward this minor. It is further alleged that these unsolicited advances caused substantial physical and emotional harm to John Doe. Subsequent to these events and on or about January 6, 2005, the minor John Doe, through his parents, John Doe Sr. and Jane Doe, brought a civil action against Mr. Townsend and the Dollar General Store in the Mississippi Band of Choctaw Indians Tribal Court. The lawsuit sought damages, including punitive damages, against the defendants for the alleged tort of (sexual) assault.

Prior to the filing of this lawsuit by the Plaintiff in early 2005, the Tribe, acting through its Attorney General's office, brought an action in the Tribal Court pursuant to § 20-1-2 of the Tribal Code, which sought to "exclude" Mr. Townsend from the Mississippi Band of Choctaw Indians Reservation. Mr. Townsend did

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for a permit to engage in and to conduct any business or activity upon the condition that the payment of tax accruing to the Mississippi Band of Choctaw Indians under the provisions of the Code shall take place, and shall keep adequate records of such business or activity as is required by the commission. Upon receipt of such permit, the applicant shall be duly licensed to engage in and conduct such business or activity. Said permit shall continue in force so long as the person to whom it is issued shall continue in the same business at the same location, unless revoked by the commissioner for cause.

not oppose the exclusion action and said exclusion order was signed by Judge Christopher Collins on September 22, 2003.

Subsequently, both Defendants filed a motion to dismiss the civil action for lack of subject matter jurisdiction. This motion to dismiss was denied in an oral opinion delivered by Judge Collins on July 28, 2005. This appeal followed. Oral argument was heard on November 16, 2007.

II. Issues

This appeal raises four issues: namely whether this is a proper matter for an interlocutory appeal; what is the effect, if any, of the exclusion order on the Court's (personal) jurisdiction over defendant, Dale Townsend; whether there is proper subject matter jurisdiction over the lawsuit as a matter of federal law; and whether a claim for *punitive* damages against non-Indian defendants is foreclosed as a matter of federal (constitutional) law.

Each issue will be discussed in turn.

III. Discussion

A. Interlocutory Appeal

Whether a matter is a proper one for interlocutory appeal is governed solely by Tribal law. Such law is embedded in the Mississippi Band of Choctaw Tribal Code at § 7-1-10(d)(1) which provides that an interlocutory appeal

> shall be granted only if the lower court has committed an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a part [sic] to act and a substantial question of law is presented which would determine the outcome of the appeal.

It is clear to the Court that the necessary predicate of "obvious error" committed by the trial court is not satisfied in the instant case. Neither *Montana v. United States,* 450 U.S. 544 (1981) nor *Nevada v. Hicks,* 533 U.S. 353 (2001) (or any other case for that matter) establish any black letter rule that forecloses potential tribal court jurisdiction in this matter. These cases merely provide relevant tests to be applied to determine whether trial court jurisdiction is appropriate in any particular instance. The facts in the instant case, as well as legal landscape of the Mississippi Band of Choctaw Indians Reservation, are readily distinguishable from both *Montana* and *Hicks* and thus there is no possibility of establishing "obvious error." For example, *Montana* involved a claim of jurisdiction over non-Indians for matters occurring on fee land and *Hicks* involved jurisdiction over *state* officials for actions that took place on trust land. Neither set of facts are analogous to those of the instant case. In fact, the Court in *Hicks* recognized as much, when it noted that "our holding in this case is limited to the question of tribal-court jurisdiction over the officers enforcing state law. *We leave open the question of tribal-court jurisdiction over non-members in general." Id.* at 358 n.2 (2001) (emphasis added).

Despite this analysis, it is nevertheless true that there has been an inexplicable delay in hearing argument on the interlocutory appeal issue. As a result of this unaccounted for delay of more than a year, the Court finds that for reasons of judicial economy and in order to avoid further delay and potential (procedural) unfairness to the parties, the Court accepts the (interlocutory) appeal, because of its unique circumstances and procedural posture.[2]

B. Exclusion Order

Defendant/Appellant Dale Townsend argues that the exclusion order against him constitutes a 'waiver' of (personal) jurisdiction.[3] Mr. Townsend argues that such waiver results from actions by the Tribal court, but that cannot be so. Courts do not waive (personal) jurisdiction requirements. Thus there is a troubling oddity at hand and that is that a plaintiff in a lawsuit (John Doe) is subject to a claim that personal jurisdiction over the Defendant has been waived by a non-party (the Tribe).

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[2] In other words, this part of the decision has no precedential value as to the general issue of what constitutes a meritorious interlocutory appeal under the Mississippi Band of Choctaw Indians Tribal Code.

[3] Defendant/Appellant Dollar General contends that the exclusion order against Dale Townsend effects its interests as well because Mr. Townsend is a necessary and indispensable party to the proceeding against it.

While a plain reading of the text of the exclusion order appears to provide no exception to its categorical language which states "that the Respondent [Dale Townsend] be and he is hereby excluded from inside the boundaries of the Mississippi Band of Choctaw Indians Reservation lands," such a narrow reading may *not* be warranted in this instance. It would seem to defy both common sense and due process[4] for the Tribe to insist on the apparent absolute terms of the exclusion order it sought, which now potentially jeopardizes the right of a Tribal member to seek civil (redress) against a non-member for actions that took place on Tribal trust land within reservation boundaries. The fact that the exclusion order was entered more than one year previous to the filing on the complaint in this matter may well explain the Tribe's failure to seek any language of exception or limitation. Yet in order to avoid any misunderstanding on this issue and to provide due respect to a co-ordinate branch of Tribal government, the Court requests that the Attorney General's office inform this Court

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[4] *See* the Mississippi Band of Choctaw Indians Constitution at Art. X Sec. 1(h) which provides that the Tribe shall not

> deny to any persons within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

See also the Indian Civil Rights Act at 25 U.S.C. § 1302(8), which provides that no Tribe shall

> deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

whether it does in fact insist on the absolute terms of the exclusion order and is opposed to a limited exception to the exclusion order for the *sole* purpose permitting Defendant Townsend to come onto the Reservation to defend this lawsuit or whether it is amenable to such a narrow exception. Such a limited exception to an exclusion order is clearly permitted under the Tribal Code. *See* §20-1-3(2).

C. Subject Matter Jurisdiction Under Federal Indian Law

The issue of the trial court's subject matter jurisdiction as a matter of federal Indian law principles involves the now familiar routine of parsing the entrails of the 'pathmaking' cases of *Montana v. United States,* 450 U.S. 544 (1981) and *Nevada v. Hicks,* 533 U.S. 353 (2001) and there [sic] application to the particular facts at hand in the instant case. Such analysis also requires an examination of this Court's opinion in *Williams v. Parke-Davis*, # 1142-01 (2004) and its relevant jurisdictional analysis.

The basic 'rules' of the Supreme Court's decisions in *Montana* and *Hicks* are relatively straightforward. Tribal civil jurisdiction over non-Indian activities that take place on land within the reservation is appropriate *only* if the non-Indian activity satisfies either or both of the prongs of the well-known *Montana* proviso.

Originally, *Montana* analysis was only required when non-Indian activities took place on fee land

within the Reservation. Subsequent cases[5] expanded the territorial reach of *Montana,* which culminated in *Hicks'* requirement that *Montana* analysis was always required, regardless of where the non-Indian activity took place. The *Hicks* case morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons,* where place was still relevant, but not determinative or dispositive. *Hicks* at 360. Needless to say, this developing jurisprudence has neither constitutional nor statutory roots, but rather is the product of generally (unarticulated) judicial common law decisionmaking.

This common law approach appears to be guided not by the normal (federal) understanding that the primary role of common law decisionmaking is to fill gaps in the relevant substantive law,[6] but rather to vindicate a conscious judicial policy to significantly insulate the non-Indians from civil accountability in Tribal courts. This concern is manifest in both *Montana* and *Hicks.* In *Montana,* this was couched in language describing the fact that non-Indian settlers on the Crow Reservation would never have envisioned being subject to tribal regulatory authority on fee land. *Montana* at 559-560. Likewise in *Hicks,* there was apparent concern to protect (non-Indian) state employees, who were legitimately carrying out

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[5] *See, e.g., South Dakota v. Bourland,* 508 U.S. 679 (1993) and *Strate v. A-1 Contractors,* 520 U.S. 438 (1997).

[6] *See, e.g.,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 363-368 (5th ed. 2007).

state functions (*i.e.* executing a joint state-tribal search warrant) on the Reservation from accountability in tribal courts. *Hicks* at 364-365.

Such concerns, however questionable they might be, are not present in the instant case. Dollar General voluntarily signed a commercial lease with Choctaw Shopping Center Enterprise, a wholly-owned Tribal entity, and came on the Reservation for said commercial activities. The notion of surprise or lack of foreseeability so central to the Court's thinking in *Montana* and *Hicks* is simply not present in the instant case. Of course, these observations do *not* obviate the necessity of *Montana* analysis, but they do provide a relevant context in which to anchor and to evaluate the required *Montana* analysis.

1. *Montana* Analysis

Classic *Montana* analysis requires an inquiry as to whether the non-Indian activity at issue satisfies either or both of the prongs of the well-known *Montana* proviso, which provides:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra* at 223; *Morris*

> *v. Hitchcock,* 194 U.S. 384; *Buster v. Wright,* 135 F. 947, 950 (CAS); see *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152-154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court,* 424 U.S. 382, 386; *Missoula County,* 200 U.S. 118, 128-129; *Thomas v. Gay,* 169 U.S. 264, 273.
>
> *Montana* at 565-566 (footnotes omitted).

Clearly, the commercial lease between Dollar General and Choctaw Shopping Center Enterprise constitutes a consensual agreement, but does that consensual agreement include the plaintiff, an individual Tribal member, who is not a party to the agreement? The Supreme Court in both *Strait* [sic] *v. A-1 Contractors* and *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645 (2001) cautioned against expansive interpretations as to the reach of consensual agreements. In this vein, Chief Justice Rehnquist used a pithy aphorism to note that "[a] nonmember's consensual agreement in one area this does not trigger tribal and civil authority in another – it is not 'in for a penny, in for a pound.'" *Id.* at 656. While hewing to this formulation, the unique facts in this case nevertheless justify a conclusion affirming Tribal court jurisdiction.

The alleged tort in this case took place on the leased premises that are subject of the consensual agreement and the individual tortfeasor was an employee, indeed the manager of the leased premises. Thus there is a considerable nexus between the alleged tort and the commercial lease. And in fact, the victim of this alleged tort was not a customer or private employee hired directly by Dollar General, but a Tribal minor placed at the store by the Tribe to receive job training. This fact tightens the nexus even further.

Indeed, it is reasonable to conclude that in addition to the consensual agreement embodied in the lease between Choctaw Shopping Center Enterprise, the wholly owned Tribal entity, and Dollar General, there is also an (unwritten) consensual agreement between the Tribe and Dollar General. The essence of such agreement being that when the Tribe places a Tribal minor with Dollar General for job training purposes, that it would be mutually understood that any issues relative to Dollar General's relationship to the minor regarding such things as training, wages, or potential harm would be resolved in Tribal Court.

Such a reading is reinforced by the fact that Dollar General not only entered into a written lease with a wholly owned Tribal entity, but it also operated under a business license granted by the Tribe and required by Tribal law. Such a license is, of course, a quintessential consensual arrangement, which is necessary to engage in commercial activities on the

Reservation. Such a business license presumably does *not* authorize (intentional) torts allegedly committed by the licensee's manager against a Tribal minor placed with the licensee for training and skill development. It strains credulity to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.

In this regard, for example, see the Eighth Circuit's decision in *Plains Commerce Bank v. Long Family Land and Cattle Company,* 491 F.3d 878 (8th Cir. 2007). In that case, the Court unanimously held that a non-Indian entity is subject to Tribal court jurisdiction for a *tort* that occurred in the context of a consensual commercial relationship:

> Here, the Tribe was doing just that and exercising its inherent authority. By subjecting the bank to liability for violating tribal anti-discrimination law in the course of its business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation. The fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here. Tort law is after all both a means of regulating conduct, *see e.g,* W. Page Keeton, et al., Prosser and Keeton on Torts

> 25 (5th ed. 1984) (Prosser), and an important aspect of tribal governance.
>
> *Plains Commerce Bank*, 491 F.3d 878, 887 (8th Cir. 2007).

Much of the above applies with equal force to analysis under the second prong relative to "direct effect on the political integrity, economic security, or the health or welfare of the tribe." The "health or welfare of the tribe" is certainly a function of the "health or welfare" of its individual members. If the Tribe cannot protect the "health or welfare" of its members by insuring the availability of a Tribal forum for disputes when it places a Tribal minor with a non-Indian commercial venture, who is on the Reservation *solely* as a result of a commercial lease with a Tribal entity, then this exception becomes essentially meaningless. It becomes no more than a bankrupt formalism. This Court believes otherwise. It believes that the Supreme Court in *Montana* meant this prong of its proviso to have potential consequences in the real world.[7] The Court considers the facts in this case to constitute such a real world situation.

---

[7] Note in this regard, Justice Ginsburg's statement in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001), relative to the enforceability of an arbitration clause that it "has a real world objective, it is not designed for regulation of a game lacking practical consequences."

2. *Parke-Davis* Analysis

Not only does the above *Montana* discussion support Tribal court jurisdiction in this case, said jurisdictional finding is also required by the Court's own precedent in the case of *Williams v. Parke-Davis,* C.A. 1142-01 (2004). In *Parke-Davis,* this Court found *both* as a matter of federal and Tribal law that the Tribal court had subject matter jurisdiction over a tort lawsuit brought by a Tribal member against a non-resident corporate entity, whose representative came onto the Reservation, and convinced Tribal officials to distribute the drug Rezulin at the Tribal pharmacy located on trust land.

The central facts in the case at bar are analogous to those in *Parke-Davis.* In both cases, the defendant specifically wanted to do business on the Mississippi Band of Choctaw Indians Reservation and made targeted efforts to do so. In both cases, the defendants were successful in such efforts. In *Parke-Davis,* Rezulin was distributed at the Tribal pharmacy. In the instant case, Dollar General obtained a written commercial lease to engage in business on leased Tribal land within the Reservation. In both cases, an alleged tort resulted from interaction between Tribal members and the business enterprise or its product. The result in *Parke-Davis* requires an affirmation of Tribal court jurisdiction in the case at bar.

As noted in *Parke-Davis,*

> Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation

> without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the state and federal sovereign but *against* the Tribal sovereign.
>
> *Parke-Davis* at 8.

D. Punitive Damages

Dollar General asserts that the fact that the plaintiff is seeking punitive damages raises federal constitutional issues relevant to the due process's proscription against 'excessive punishment.' Such a claim is both unwarranted and somewhat fanciful. As a general proposition, constitutional protections do not apply against Tribal governments. *See, e.g., Talton v. Mayes,* 163 U.S. 376 (1896). In addition, said proscription against 'excessive punishment' applies in both the Indian Civil Rights Act of 1986, 25 U.S.C. § 1302(8) and the Mississippi Band of Choctaw Indians Constitution at Art. X Sec. 1(h). As noted in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), no *federal* remedy is available in tribal civil matters, except in Tribal court:

> Tribal forums are available to vindicate rights created by the ICRA, § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal forums have repeatedly been recognized as appropriate forums for the

> exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Id. at 65.

IV. Conclusion

For all the above-state [sic] reasons, the (interlocutory) appeal is dismissed and the case is remanded[6] for immediate trial on the merits.

IT IS SO ORDERED.

FOR THE COURT:

/s/ Frank Pommersheim
Frank Pommersheim
Associate Justice

Dated: February 8, 2008.

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[6] Note that no actual trial shall be scheduled until the Tribe's Attorney General's office has responded to its position on the "exclusion" order, discussed *supra* at pp. 4-5, and this Court has ruled on any potential modification of said order.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-60668

DOLGENCORP, INC.; DOLLAR GENERAL CORP,

Plaintiffs-Appellants

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, In His Official Capacity; JOHN DOE, A Minor, By and Through His Parents and Next Friends John Doe Sr. and Jane Doe,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi

---

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 14, 2014)

(Opinion October 3, 2013, 732 F.3d 409)

Before SMITH, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 5 judges voted in favor of rehearing (Judges Jones, Smith, Clement, Owen, and Southwick), and 9 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Dennis, Prado, Elrod, Haynes, Graves, and Higginson).

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.
JAMES E. GRAVES, JR.
United States Circuit Judge

JERRY E. SMITH, Circuit Judge, joined by JONES, CLEMENT, OWEN, and SOUTHWICK, Circuit Judges, dissenting from the denial of rehearing en banc:

The opinion for the panel majority, although well crafted, takes Indian law well beyond anything supported by applicable precedent. I respectfully dissent from the denial of rehearing en banc.

I have explained why the majority opinion is error. *See Dolgencorp, Inc. v. Miss. Band of Choctaw*

Indians, 732 F.3d 409, 419-24 (5th Cir. 2013) (Smith, J., dissenting). But error – indeed even grave error, as here – is ordinarily not enough to warrant en banc review. Such rehearing is justified if "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(2). That test is easily met here, because "[t]his ruling profoundly upsets the delicate balance that the Supreme Court has struck between Indian tribal governance . . . and American sovereignty." *Dolgencorp,* 732 F.3d at 419.

Until now, no circuit court of appeals had upheld Indian-court jurisdiction, under the so-called "first exception" announced in *Montana v. United States,* 450 U.S. 544, 564 (1981), over a tort claim against a non-Indian defendant. The holding is ambitious, to say the least, coming from a circuit that decides little Indian law. If this court is to work such a change in established precedent, it should be the careful work of the full court and not just a two-judge majority.

The panel majority emphasizes the reprehensible nature of the alleged act by opining that "[i]t is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees." *Dolgencorp,* 732 F.3d at 415. Even this horrendous deed, however, does not implicate "tribal self-government" or the tribe's ability "to control internal relations." *Montana,* 450 U.S. at 564. Moreover, no remedy is lost, because it is undisputed that the state courts of Mississippi are fully empowered to vindicate the plaintiff's rights; this is mainly a turf battle over whether Indian sovereignty

trumps the right of a non-Indian to have its case tried in an American forum.

As I showed in dissent, all of the Supreme Court's post-*Montana* decisions have tended to limit Indian-court jurisdiction in cases such as this. Nowhere has the Court endorsed no-holds-barred Indian jurisdiction requiring non-Indians to defend, on the basis of implicit consent by their presence and activity on a reservation, tort actions of whatever nature. The Supreme Court's recent pronouncement is plain: Regulation of the affairs of non-Indians "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citing *Montana*, 450 U.S. at 564).

An act committed by a non-Indian on an Indian – even where the alleged facts are as distasteful as these – should not be a vehicle for disrupting the carefully-drawn line separating tribal and U.S. sovereignty. I respectfully dissent.

OPPOSITION BRIEF

No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, *ET AL.*,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008) change the rules established by *U.S. v. Montana*, 450 U.S. 544 (1981) and thus deprive the Mississippi Band of Choctaw Indians ("Tribe") of jurisdiction to regulate working conditions (for non-Indian employers and tribal member employees) on its reservation (trust) lands and deprive its courts of jurisdiction to adjudicate a suit involving a tort claim grounded in an on-reservation agreement ("consensual relationship") between Petitioners (non-Indians) and the Tribe and a tribal member student intern who claims he was sexually assaulted by Petitioners' store manager during working hours at Petitioners' store located on the Tribe's reservation lands?

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STATEMENT OF THE CASE

INTRODUCTION

Although this Court granted *certiorari* in *Plains Commerce, supra* on the same question on which Petitioners now seek review (Pet., p.14), the Court decided not to rule on that question. After *Plains Commerce,* the Court again declined an invitation to rule on the question whether tribal courts could under *Montana* exercise civil jurisdiction over tort claims against non-Indians based on their on-reservation conduct. *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927 (8th Cir. 2010), *cert. denied,* 131 S.Ct. 1003 (2011). This Court should likewise decline Petitioners' current invitation to review these questions.

The Petition does not present any issue under *Montana* respecting (a) the scope of tribal civil jurisdiction over non-Indian activity on non-Indian owned fee lands within reservation boundaries; (b) tribal court jurisdiction to adjudicate contract claims against non-Indians under *Montana's* consensual relationship exception; or, (c) application of *Montana's* second exception. Nor do Petitioners assert that actual bias or due process violations have occurred in the tribal court proceedings in this case. (Pet.App., p.6).

The lower courts upheld the Choctaw court's jurisdiction under *Montana's* consensual relationship exception and satisfaction of the nexus test established by this Court in *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 656 (2001). (Pet.App., pp.1, 38, 75). These rulings were grounded in Petitioners' agreement to

participate in a tribal job training program at its on-reservation store, breach of obligations Petitioners undertook as part of that participation (including provision of appropriate supervision of the Choctaw student interns in a safe work place) the clear nexus between that agreement and the state law tort claims pled; and, the determination that the Tribe had jurisdiction to regulate work place conditions and claims derivative thereof involving tribal members working on its reservation lands. (Pet.App., pp.1-21).

I. Factual Background

Respondent Doe is a minor child and a member of the Mississippi Band of Choctaw Indians, a federally-recognized Indian Tribe (the "Tribe").[1]

Petitioners own and operate a Dollar General store on the Tribe's reservation (trust) land pursuant to a long-term lease with the Tribe which began in 2000 and continues in force today.[2]

The Tribe has a court system consisting of various trial level courts and the Choctaw Supreme Court.[3] Respondent Christopher Collins is an attorney licensed

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[1] Pet., p.5; Pet.App., pp.14, n.4, 40.

[2] Vol. 1, USCA5, pp.53, 67-70.

[3] *See,* Vol. 8, Jackson Miller, Encyclopedia of Mississippi Law, Mississippi Practice Series, Tribal Courts, §72.6 (hereinafter, "Jackson Miller"), page 380; *see, Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773, 781 and n.6 (S.D.Miss. 2001) (rejecting argument that Choctaw Tribal Court is biased forum; noting that the Tribe's judges are subject to a judicial code of ethics).

to practice law in the State of Mississippi and in the Choctaw courts who serves as a civil judge in the Tribe's court system, subject to a judicial code of ethics.[4] The Tribe has a written code of laws[5] which borrows from Mississippi law for certain civil matters.[6]

Petitioners are not strangers to the Tribe's laws or the Tribe's court system. Petitioners' lease with the Tribe provides:[7]

> XXVII. GOVERNING LAW. This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be

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[4] §§1-3-1 – 1-3-4, Title I, Chapter 3, Choctaw Tribal Code; *see,* n.3.

[5] The entire Choctaw Tribal Code is available at http://www.choctaw.org/government/court/code.html.

[6] Section §1-1-4, C.T.C.:
Law Applicable in Civil Actions

> In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.

[7] Vol. 1 USCA5, p.417 and n.6.

> in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act....

The Tribe operates a job training program for Choctaw students on the reservation known as the Youth Opportunity Program ("YOP"). Petitioners agreed to have the Dollar General store participate in that program in 2003 at the request of the Tribe,[8] and accepted several tribal member student interns to work there, including Respondent Doe.[9]

Alleging that he had been sexually assaulted by the Store Manager at the store during work hours, Doe acting by and through his parents (all tribal members) sued Petitioners in the tribal court on the basis of various state law tort theories borrowed as tribal law, including vicarious liability and/or negligence in hiring, training and supervising the store manager. *See,* cases cited at p.29, *infra.* The Doe Respondents sought compensatory and punitive damages.[10]

Petitioners assert as "fact" the YOP director's deposition answer[11] that her program "had no impact

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[8] Vol. 1 USCA5 p.1058. In the final summary judgment proceedings, Petitioners told the Court: "Dollar General has not argued at this juncture that it did not consent to participate in the YOP " (Emphasis added). Vol. 1, USCA5 p. 1001.

[9] Vol. 1 USCA5 pp.23, 927-931 (Exhibit 4).

[10] Vol. 1, USCA5, pp.23-26.

[11] The YOP director's deposition was not a deposition under Choctaw R.Civ.P 30(b)(6). (Doc.52, case 4:08-cv-00022-TSL-LRA,

on either the Tribe's governance or internal relations." (Pet., p.5). That testimony does not establish that statement to be "true" or a "fact" for purposes of the *Montana* test, and the statement is not "true" in that sense Whether operation of the YOP program (or depriving the tribal court of jurisdiction to adjudicate tort claims arising from Petitioners' agreement with the Tribe and the Does to participate in the YOP) would harm the Tribe's right of self-governance or intrude on its internal relations under the *Montana* test, is not a factual issue as regards the consensual relationship exception, but an issue of law on which the lower courts properly gave an affirmative answer. *See,* Pet.App., pp.16-17; *see,* pp.21-24, *infra*.

II. Legal Background

A. The Scope Of Indian Tribes' Legislative Authority Over Non-Indians

This Court in *Montana, supra* at 557 affirmed the regulatory jurisdiction of Indian tribes over the hunting and fishing activity of non-Indians occurring on reservation lands owned by or held in trust for the Tribe:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe,...and with this holding we can readily agree. ...What remains is the question of the power of the Tribe to regulate

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U.S. District Court, Southern District of Mississippi). Hence, the YOP director's testimony is not binding on the Tribe or its Courts.

> non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

In addressing the latter issue this Court established the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." (*Id.* at 565), subject to two exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe.

Montana, supra at 566

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)—after first reiterating the *Montana* ruling affirming the Tribe's unquestioned sovereign authority over non-Indian activities on reservation (trust) lands, *Id.* at 650—held that to invoke *Montana's* first exception also requires that the exercise of tribal authority "have a nexus to the consensual relationship itself." *Id.* at 656.

This Court (and the Circuits) have continued to acknowledge that even if the *Montana* framework

applies to reservation (trust) lands,[12] the legal basis for tribal government regulatory authority over the activities of non-Indians is enhanced where, as here, those activities occur on the Tribe's own reservation lands rather than on non-Indian owned fee lands located within reservation boundaries. This is because in the reservation (trust) land circumstance tribal jurisdiction is bolstered by the tribe's inherent authority to exclude or condition entry of non-Indians onto their lands. *Plains Commerce, supra* at 328-331; *Atkinson, supra* at 650; *Nevada v. Hicks,* 533 U.S. 353, 359-360 (2001); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 454, n.9 (1997); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148-149 (1982); *Attorney's Process, supra* at 938-940 (reiterating that "tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner"

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[12] *Montana's* general rule as originally established applied only when a tribe sought to regulate or adjudicate non-Indian conduct occurring on non-Indian owned fee land. *Montana, supra* at 557, 566; *Strate v. A-1 Contractors,* 520 U.S. 438, 445-447, 454 (1997); *Atkinson, supra* at 646 and 653. Now, although there has never been a U.S. Supreme Court holding to that effect, *dicta* in *Nevada v. Hicks,* 533 U.S. 353, 373 (2001) (Souter, J. concurring) and in *Plains Commerce, supra* at 328-331 (2008) have given rise to the view that *Montana's* general rule now also applies to non-Indian conduct occurring on reservation trust land. The Choctaw Supreme Court has so ruled. (Pet.App., pp.82-83). However, as argued to the District Court, if the *Montana* rule and exceptions only apply to non-Indian owned fee lands within reservation boundaries and the Tribe's regulatory power to exclude and condition entry of non-Indians onto reservation (trust) lands is sufficient to sustain the exercise of tribal jurisdiction over claims against non-Indians arising from their activity on those lands, this provides an alternative ground supporting the Fifth Circuit's ruling; *see,* n.13, *infra.*

whether it does so via positive law or adjudication of civil tort claims); *accord, Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance, et al.*, 642 F.3d 802, 808-816 (9th Cir. 2011).[13] (Tribal power to exclude non-Indians from tribal land includes the power to regulate them for conduct occurring there, except as otherwise limited by the Congress or the Supreme Court).

On-reservation employment relationships between non-Indian employers and tribal member employees involve the kind of non-Indian activity which is properly subject to tribal government regulatory jurisdiction. *Plains Commerce, supra* at 334-335 (referencing "a business enterprise employing tribal members" as an example of on-reservation non-Indian activities ("consensual relationships") that may be regulated by a tribe under *Montana* if the nexus test is met); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007); *Salt River Project Agricultural Improvement and Power District v. Lee*, 2013 WL 321884 (D.Ariz.) (unpublished) (requirement that tribal court suit based on consensual relationship exception must "be justified by reference to the tribe's sovereign interest" is deemed satisfied where the suit involved dispute implicating tribal member employment on-reservation); *see, Walls v. North Mississippi Medical Center*, 568 So.2d 712 (Miss. 1990)

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[13] The Ninth Circuit also held in *Water Wheel* (after *Plains Commerce*) that where a suit involves non-Indian torts (there, trespass) on reservation trust land, the tribe's power to exclude (and set conditions on entry) will anchor tribal court jurisdiction independent of the *Montana* test. *Id.* at 816-819; *see*, n.12, *supra*.

(student nurse assigned to work at medical center under an unwritten student intern program constituted "a consensual relationship between the parties to the arrangement").

Petitioners told the Choctaw Supreme Court in Oral Argument that John Doe's relationship with their store was in the nature of an employment relationship (Vol. 1 USCA5 p.320). *See, infra* at pp.14-15.

B. The Scope of Indian Tribes' Adjudicatory Authority Over Non-Indians

In *Strate, supra* at 438, this Court ruled that a tribe's adjudicatory authority over non-Indians does not exceed its regulatory authority, and discussed the *Montana* rules as they apply to cases examining when non-Indian parties are required to exhaust tribal court remedies regarding claims arising from their on-reservation (or within reservation) activities under the tribal exhaustion rule established in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). Under that rule, exhaustion of tribal remedies is not required unless a tribe has at least colorable jurisdiction under the *Montana* test. *Id.; e.g.. Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002) (Choctaw Tribal Courts have colorable jurisdiction to adjudicate contract and tort claims filed by tribal members against lender respecting on-reservation transactions), *cert. denied*, 537 U.S. 818 (2002).

Although *National Farmers Union* and *Iowa Mutual* were tribal exhaustion cases, this Court in *Strate* reaffirmed that those rulings (when read together with

Montana) stand for the "the unremarkable proposition that where tribes possess authority to regulate the activities of non-members, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' 480 U.S., at 18, 107 S.Ct. at 977." *Strate, supra* at 452. In *Strate* the Court reaffirmed that "*Montana*, as we have explained, is the controlling decision for this case. To prevail here, petitioners must show that [the plaintiff's] tribal court action against non-members qualifies under one of *Montana's* two exceptions." *Id.* at 457

Applying these rules, the Circuits (before *Plains Commerce*) routinely affirmed tribal court adjudicatory authority where one of the *Montana* exceptions and the *Atkinson* nexus test were satisfied and the non-Indian activity giving rise to the tribal court claim fell within the Tribe's regulatory jurisdiction. *E.g., TTEA v. Ysleta del Sur,* 181 F.3d 676, 685 (5th Cir. 1999) (upholding tribal court's jurisdiction to declare that a non-Indian company's contract with a tribe was void under federal law in a suit filed against the non-Indian party in tribal court); *Burrell v. Armijo,* 456 F.3d 1159, 1170 (10th Cir. 2006) (affirming tribal court jurisdiction to adjudicate lease termination dispute with non-Indian tenant); *FMC, supra* 1312-1315 (tribal court had jurisdiction to adjudicate dispute between tribe and non-Indian company regarding enforcement of tribal employment laws based on consensual relationship exception).

In *Plains Commerce* this Court reaffirmed that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction. *Id.* at 330. Then, based on its ruling that Indian tribes have no jurisdiction to regulate a sale of non-Indian owned fee land to a non-

Indian buyer even if that land is located within the tribe's reservation boundaries, the Court held (applying the rule that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction) that the tribal court did not have jurisdiction to adjudicate tort claims arising from that non-Indian activity. *Id.* at 340. The Court in *Plains Commerce* did not address whether a tribal court could adjudicate tort claims against non-Indians arising on tribal (trust) reservation land where the consensual relationship, nexus and regulatory jurisdiction requirements are met.[14]

There is unanimity among the Circuits which have addressed the issue that this Court's ruling in *Plains Commerce* did not change anything about the consensual relationship exception or the nexus test. Pet.App., pp.15-18; *Evans v. Shoshone-Bannock Land Use Policy Commission,* 736 F.3d 1298, 1303 (9th Cir. 2013) (citing *Plains Commerce* and applying *Montana's* consensual relationship exception without change); *accord, Grand Canyon Skywalk Development, LLC v. 'SA' NYU WA Incorporated,* 715 F.3d 1196, 1205-1206 (9th Cir. 2013); *Water Wheel, supra* at 810-820 and n.6 (affirming tribal court jurisdiction over contract and tort claims under *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe

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[14] This Court did redefine the second *Montana* exception and significantly narrowed the circumstances in which it can be invoked to sustain the exercise of tribal jurisdiction, requiring proof that the exercise of tribal jurisdiction is necessary to address non-Indian conduct "which imperil(s) the subsistence of the tribal community." *Plains Commerce, supra* at 340-341. Respondents have not relied upon the second exception to support tribal jurisdiction in these proceedings.

and non-Indian parties, rejecting arguments that *Plains Commerce* changed the rules regarding the consensual relationship exception); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140 (10th Cir. 2011) (affirming district court's application of the consensual relationship test after *Plains Commerce*; ruling that the *Montana* test is satisfied by proof of a consensual relationship and "a sufficient 'nexus' between that relationship" and the subject tribal court claim, without any suggestion that any separate proof of special harm to the tribe's right of self-governance or internal affairs was required); *Attorney's Process, supra* at 936, 937-946 (8th Cir. 2010) (recognizing that *Plains Commerce* left intact the basic *Montana* framework and its two exceptions); *Phillip Morris USA, Inc. v. King Mountain Tobacco,* 509 F.3d 932, 937, 940-942 (9th Cir. 2009) ("*Montana, Strate,* and *Hicks*...are affirmed in important respects by the Court's most recent tribal jurisdiction decision in *Plains Commerce;*" expressly rejecting the argument that a special showing of significant harm to the tribe's political existence or internal relations is required to invoke the consensual relationship exception).

III. Procedural Backgrounds

A. Proceedings In The Tribal Court

The Does' Amended Choctaw Court Complaint pled *inter alia*:

> I.
>
> Your Plaintiff alleges and charges that as a thirteen year old minor on July 14, 2003, that he was employed with the Youth Opportunity Program and was assigned to the Dollar General

Store at Choctaw Towne Center on the Pearl River Reservation located within the exterior boundaries of the Choctaw Indian Reservation. Further, this Honorable Court has jurisdiction of the parties and subject matter in that all occurrences giving rise to Plaintiff's cause of action occurred within the confines of the Choctaw Indian Reservation.

II.

That the minor Plaintiff was assigned to Dollar General's store and that Dale Townsend was the immediate supervisor of the minor at Dollar General Store.

* * * *

III.

That at all times complained of herein, the Defendant, Dale Townsend, an adult, was the manager in charge of the Dollar General Store at Choctaw Towne Center, and at all times acted as the agent, servant, and alter-ego of the Defendant, Dollar General Corporation, and that all acts complained of were intentional and amounted to gross negligence on the parts of Dale Townsend and Dollar General Corporation, jointly and severally.

* * * *

VI.

Defendant, Dollar General Corporation, negligently hired, trained or supervised Defendant Townsend. (Emphasis added)

Paragraphs IV, V and VII of the Does' Choctaw Court Complaint then set out their factual allegation respecting the several sexual assaults he sustained at

the Dollar General store at the hands of Dale Townsend, and their aftermath.[15]

At no time during the Choctaw Tribal Court proceedings did Petitioners seek discovery or make any kind of factual attack on the Choctaw Court's jurisdiction.[16] Instead, they sought dismissal by motion under Choctaw Rule of Civil Procedure 12(b)(1), arguing only legal grounds in attacking the Tribal Courts' jurisdiction. In that context, all factual allegations of the Complaint (and reasonable inferences therefrom) were taken as true.[17] None of the Complaint's allegations were controverted.

Petitioners admitted in oral argument before the Choctaw Supreme Court that there existed an employment type relationship between the minor child and Petitioners which they expected to support a worker's compensation exclusive remedy defense which they planned to raise if their jurisdictional motion was denied:

> The Plaintiff filed a complaint in Choctaw Tribal Court alleging that he was assaulted at a Dollar General Store that is located on the Reservation. ...Dollar General would not have any liability in this case, regardless, under the Plaintiff's

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[15] Vol. 1 USCA5 pp.23-26.

[16] Vol. 1 USCA5 pp.19-180, 303-386.

[17] Vol. 1 USCA5 p.29.

allegations due to worker's comp. exclusive remedy...[18] (Emphasis added).

After briefing and oral argument,[19] the Choctaw Supreme Court ruled (prior to the this Court's decision in *Plains Commerce*) that the Choctaw Courts could properly exercise jurisdiction over the Does' claims against Petitioners and its reservation store manager Dale Townsend under both exceptions to *Montana's* general rule.[20] The Court's ruling relied in part upon the consensual relationship evidenced by Petitioners' agreement with the Tribe (and the Does) to participate in the Tribe's YOP.[21]

B. Proceedings In The District Court

The District Court initially denied Petitioners' Motion for Temporary Restraining Order/Preliminary Injunctive Relief.[22] The Court, however, granted injunctive relief in favor of the store manager "as the

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[18] Vol. 1 USCA5 p.320.

[19] Vol. 1 USCA5 pp.42-187.

[20] Vol. 1 USCA5 pp.194-197, 199; The Choctaw Supreme Court (sensitive to the due process rights of Petitioners and the Does) has ruled that the Does' claims against Petitioners cannot proceed in the Tribal Court until an Exclusion Order barring Dale Townsend (the former store manager) from coming onto the reservation has been modified to permit his participation in the trial and discovery proceedings as a witness. That Order remains in force. Vol. 1 USCA5 pp.191-193, 199 and n.8; *see also,* pp.296, 303-311 and 562-563.

[21] Vol. 1 USCA5 p.195.

[22] Vol. 1 USCA5 p.635.

absence of tribal court jurisdiction over Dale Townsend is manifest."[23]—because he was not a party to a qualifying consensual relationship. Neither of those rulings was appealed.

Later, after permitting discovery bearing on "the particulars of the Tribe's and John Doe's relationship(s) with [Petitioners] as a result of John Doe's placement with [Petitioners] pursuant to the Tribal [YOP],"[24] the District Court ruled that Petitioners had agreed to participate in the Choctaw YOP program,[25] that the YOP agreement constituted a qualifying consensual relationship with the Tribe and with John Doe and his parents (all tribal members) under *Montana*;[26] and, that the Does' tort claims had a direct logical nexus to that consensual relationship.[27] The Court rejected

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[23] Vol. 1 USCA5 pp.635-636.

[24] Vol. 1 USCA5 pp.806-808. Respondents opposed this discovery order (Vol. 1 USCA5, pp.638-665, 767-905) and continue to believe that Petitioners should have been required to seek discovery on these issues in the Choctaw Courts based on *National Farmers Union*. *See, Water Wheel Camp, supra* at 817 and n.9 (9th Cir. 2011) (District Court erred in considering evidence "which was not before the tribal court" in ruling on *Montana* jurisdiction question as this violated the admonition of *National Farmers Union* at 856 that "[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.").

[25] Pet.App., p.45, n.1; *see,* n.8, *supra*.

[26] Pet.App., pp.45-46.

[27] Pet.App., p.46.

Petitioners' *Plains Commerce* arguments, granting summary judgment for Respondents and against Petitioners.[28]

C. Proceedings in the Court Of Appeals

The Fifth Circuit initially affirmed the District Court for the same reasons as set out above and as summarized in the Petition at pp.6-9. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 732 F.3d 409 (5th Cir. 2013). Petitioners sought rehearing *en banc* which was denied by a vote of 9 to 5. The panel then vacated its original opinion and issued a new opinion (with minor revisions) affirming the District Court on the same grounds. *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014) (Pet.App., pp.1-36). Judge Smith dissented. (Pet.App., pp.22-36); *see, infra* at pp.24-28.

REASONS FOR DENYING THE WRIT

I. There Is No Split In The Circuits

There is no split in the circuits as to any aspect of the Fifth Circuit's ruling. No federal circuit which has applied the consensual relationship exception and nexus test after *Plains Commerce* has ruled that *Plains Commerce* changed anything about that exception or the nexus test. (Pet.App., pp.16-17); *See,* pp.11-12, *supra.*

Further, every federal circuit which has considered the issue has ruled that tribal courts can exercise civil jurisdiction over tort claims satisfying these tests, so

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[28] Pet.App., pp.46-54.

long as the subject matter of the suit otherwise falls within a tribe's regulatory jurisdiction. Pet.App., p.11, n.3; *Attorney's Process, supra* at 938 ("If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here."); *Water Wheel, supra* at 810-820 and n.6 (affirming tribal court jurisdiction over contract and tort claims under *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe and non-Indian parties); *accord, Plains Commerce Bank v. Long Family Land and Cattle Company,* 491 F.3d 878, 887 (8th Cir.2007) ("Tort law is after all both a means of regulating conduct, *see e.g.,* W. Page Keeton, et al., Prosser and Keeton on Torts 25 (5th ed.1984) (Prosser), and an important aspect of tribal governance"), *reversed on other grounds, Plains Commerce, supra,* 554 U.S. 316; *see, Bank One, N.A. v. Shumake, supra* (requiring exhaustion of tribal remedies on contract and tort claims against non-Indian defendant arising from Bank's on-reservation consensual relationship because the tribal court had colorable jurisdiction over all of those claims); *see, Farmers Union Oil Company v. Guggolz,* 2008 WL 216321 (D.S.D.) (unpublished) (ruling that adjudicating a tort claim based on a premises liability theory was a kind of "other means" for exercising tribal jurisdiction where the tort claim had a logical nexus to underlying consensual relationships between the tribe and tribal members and an on-reservation convenience store operator).

These cases are directly in line with this Court's recognition in *El Paso Natural Gas Co. v. Neztsosie,*

526 U.S. 473, 482 (1999) that but for a federal statute which converted state (and tribal) law tort claims against uranium mining companies into federal claims and evidenced a clear intent of Congress (even for tort claims arising on-reservation) to have all such claims heard in the federal courts, "there was little doubt that the tribal court had jurisdiction over such tort claims." This point was reiterated in *Hicks, supra* at 369.

Likewise, all the federal circuits which have addressed the issue have ruled that employment relationships on the reservation between a non-Indian employer and tribal members are the kind of consensual relationship which can satisfy *Montana's* first exception and trigger tribal regulatory and adjudicatory jurisdiction—when the nexus test is also satisfied. *See,* pp.8-9, *supra.*

Given the absence of a split in the Circuits this case is not a proper vehicle for addressing the question presented. *McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, J.).

II. This Case Is Still In An Interlocutory Stage And Is Not Suited For This Court's Review

This Court has ruled that suits challenging tribal court jurisdiction under *Montana* should be decided by the federal courts after exhaustion of tribal court remedies based on a full record as developed in the tribal courts. *National Farmers Union,* 471 U.S. at 856 ("The orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court...").

Since Petitioners mounted their jurisdictional challenge in the Choctaw Court solely via the

equivalent of a Rule 12(b)(1) *facial* attack on the tribal court's jurisdiction, the only facts which were before the Choctaw Trial Courts were those set out in the Plaintiff Does' Complaint—all of which had to be taken as true for purposes of Petitioner's Motion to Dismiss. *See, Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 699-700 (5th Cir.2004) (on Rule 12(b)(1) motion asserting facial attack on jurisdiction factual allegations of complaint "are taken as true"). [29]

Unlike *Plains Commerce,* which came to this Court only after trial and post-trial proceedings in the tribal court—this case is still in an interlocutory stage and is not a suitable vehicle for assessing the reach of tribal court civil jurisdiction over tort claims as requested by Petitioners. *Hamilton-Brown Shoe Company v. Wolf Brothers and Company,* 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor and Aroostock R.R. Company,* 389 U.S. 327, 328 (1967).

III. The Fifth Circuit's Ruling Does Not Conflict With Any Ruling Of This Court And Does Not Expand Tribal Court Jurisdiction

(1) The Fifth Circuit's ruling does not conflict with any ruling of this Court. It is true (as noted at Pet., p.1) that this Court said in *Hicks, supra* at 358, n.2 that it "has never held that a tribal court had jurisdiction over a nonmember defendant." It is equally true that this Court has never held that a tribal court cannot lawfully

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[29] Although limited jurisdictional discovery was permitted in the U.S. District Court, none of the facts elicited in that discovery were ever put before the tribal courts. This violated this Court's rules requiring exhaustion of tribal remedies. *See,* n.24, *supra*.

exercise jurisdiction over civil claims filed by a tribe or its members arising from voluntary consensual relationships formed on (and imposing non-Indian obligations to be carried out on) a tribe's reservation trust lands falling within the Tribe's regulatory jurisdiction and satisfying *Montana's* first exception where the nexus test of *Atkinson* is also satisfied. The plain import of this Court's post-*Montana* cases is that the exercise of tribal jurisdiction in those circumstances is appropriate. *National Farmers Union; Iowa Mutual; South Dakota v. Bourland*, 508 U.S. 679 (1993); *Neztsosie; Strate; Hicks; Atkinson.*

Plains Commerce did not change anything about these rules as regards the consensual relationship exception. *See,* authorities cited at pp.11-12, *supra.*[30] The same principles respecting the requirement for linkage between a given tribal court case and the Tribe's underlying right to self-government established

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[30] *See,* Krakoff, "Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges," 81 University of Colorado Law Review, 1187, 1223 (2010) ("Plains Commerce left Strate's doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the Montana exceptions"); "Note: Sorting out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation," 33 American Indian Law Rev. 385 (2008-2009) ("As it stands, Plains Commerce Bank represents no disagreement over the Strate-Montana doctrine. The two exceptions continue untouched. The five justice majority excluded the first Montana exception by finding that the case involved a sale of fee land between nonmembers. ...Lower courts should apply the Strate-Montana doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine.").

in *Montana* were simply reiterated in *Plains Commerce*. *Id.* at 332-335.

The Fifth Circuit correctly ruled that *Plains Commerce* imposed no evidentiary requirement to make the kind of "special harm to tribal self-government or internal relations" showing required to invoke *Montana's* (second) "political integrity" exception (*see,* n.14) in order to invoke *Montana's* (first) consensual relationship exception. (Pet.App., pp.15-18, n6).

Petitioners' argument below (and the Petitioners' reference to the YOP Director's deposition testimony on this issue, *see,* pp.5-6, *supra)* all rest on the erroneous premise that the Court in *Plains Commerce* collapsed the two *Montana* exceptions into one—requiring a tribal party to satisfy all the requirements for both exceptions to invoke the *Plains Commerce* consensual relationship exception. That argument rests upon two words in the *Plains Commerce* opinion at 337:

> ... The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land within the limits set forth in our cases.
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> ****
>
> ...Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his action. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal

relations. *See Montana*, 450 U.S., at 564. (Emphasis added).

This Court in *Plains Commerce* clearly distinguished between the two exceptions and their requirements. *Id.* at 337-340 and 391. In context, the Court's "even then" reference in the *Plains Commerce* passage Petitioners rely upon (Pet., pp.9, 12) is simply a reminder that the reach of tribal jurisdiction under the consensual relationship exception is restricted to those circumstances when the non-Indian activities giving rise to the suit fall within the Tribe's regulatory jurisdiction, where a consensual relationship anchoring the claim exists, the nexus test is satisfied and no special laws otherwise deprive the tribal court of jurisdiction. (Emphasis added). (Pet.App., pp.16-18). As the Fifth Circuit recognized and rejected, adopting Petitioners' (and Judge Smith's) "'profoundly narrow' interpretation of the *Montana* consensual relationship exception would read [that] exception out of existence." *Id.* at Pet.App., p.18, n.6. Nothing in *Plains Commerce* requires or supports that interpretation.

If those requirements are not satisfied, the tribe's assertion of regulatory or adjudicatory jurisdiction cannot be justified as an exercise of a tribe's right of self-government; but, if those requirements are met, the exercise of tribal court jurisdiction is justified based on the tribe's right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959), cited in *Montana*. Under *Williams* and *Montana* it is integral to a tribe's right of self-government that it be able to regulate voluntary consensual relationships between nonmembers and the tribe (or tribal entities) or tribal members on their reservation lands, and for

their courts to be able to adjudicate claims involving disputes arising from such relationships—where those claims have the requisite nexus to the consensual relationship involved. *Montana, supra* at 565-566; *Nevada v. Hicks, supra* at 361 (paramount among the interests the *Montana* exceptions were intended to protect is the right of Indian tribes "to make their own laws and be governed by them"); *Plains Commerce, supra* at 332-333; *TTEA, supra* at 683-685.

(2) Judge Smith in dissent from the Fifth Circuit majority opined (Pet.App., pp.22-36) that there is a difference between subjecting a non-Indian defendant to tribal court jurisdiction to adjudicate tax or contract disputes which involve enforcement of contract rights or tax laws which were in existence at the time the non-Indian entered into an otherwise qualifying consensual relationship under *Montana,* as compared to the circumstances involved in adjudication of tort claims arising from such relationships. (Pet.App., pp.31-33); and, opined that "*Montana's* first exception envisages discrete regulations consented to ex ante;" (emphasis added) whereas "the [Fifth Circuit] majority...upholds an unprecedented after-the-fact imposition of an entire body of tort law based on [Petitioners'] participation in a brief, unpaid internship program." (Pet.App., p.32). (Emphasis and insert added).

Judge Smith also opined that "[a]lthough the claims that Doe wishes to press against Dolgencorp have familiar state-law analogues, the majority's aggressive holding extends to the entire body of tribal tort law – including any novel claims recognized by the Choctaws but not by Mississippi." *Id.* at 31.

Judge Smith's dissent further relied on another unsupportable assertion that "Dolgencorp could not have anticipated that its consensual relationship with Doe would subject itself to any and all tort claims actionable under tribal law" and concluded that "there is an insufficient nexus to satisfy *Montana's* first exception." (Pet.App., p.31).

Judge Smith's *ex ante* distinction fails because there is no golden divide which separates the circumstances involved in (a) tax or contract disputes filed in tribal courts against non-Indians based on contracts or other "consensual relationships," from (b) tort claims filed in tribal courts against non-Indians arising from such relationships, in terms of what body of law is to be applied. While contract terms are negotiated in advance and then existing tribal tax laws may be known, tribal tax law (and other tribal law) bearing on contract disputes can and does change after contracts are signed—just as occurs with state and federal law. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974) (reiterating general rule that "...a court is to apply the law in effect at the time it renders its decision..."). The same is true for tort law. The body of tort and other law that exists at the time a contract is signed (or a different kind of "consensual relationship" is formed) may very well evolve from then until a dispute arises. In *Merrion, supra* at 147-149, the Court affirmed a tribe's new constitutional authority to impose a severance tax on mining company lessees for on-reservation mineral extraction after the leases were signed based on the tribe's inherent sovereignty and power to exclude. The Court emphasized that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign,"

citing Veix v. Sixth Ward Building and Loan Assn. of Newark, 310 U.S. 32 (1940) and *Home Building and Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934). There is no valid "*ex ante*" *vs.* "after-the-fact" distinction here.

Moreover, Petitioners were clearly on notice from this Court's ruling in *Neztsosie, supra* at 482, n.4 (reiterated in *Hicks, supra* at 369) (that "there was little doubt" the Navajo Courts would have had jurisdiction over the torts involved in *Neztsosie,* but for a supervening federal statute); and, from the Fifth Circuit's prior rulings in *TTEA, supra* (tribal court had jurisdiction to adjudicate dispute with non-Indian grounded in interpretation of 25 U.S.C. §81) and *Bank One, N.A. v. Shumake, supra* (ruling that the Choctaw Courts had colorable jurisdiction to adjudicate tort and contract claims arising from on-reservation transactions), *cert. denied*, 537 U.S. 818 (2002) where the *Montana* consensual relationship exception and *Atkinson* nexus tests were satisfied.

Finally, the Fifth Circuit properly rejected Petitioners' (and Judge Smith's) views that "there is no nexus between [Petitioners] participation in the YOP and Doe's tort claims" and that the Tribe has no regulatory jurisdiction here:

> ... In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The

fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in a tribal court makes no difference. *See, e.g., Attorney's Process,* 609 F.3d at 938. To the extent that foreseeability is relevant to the nexus issue, as Dolgencorp suggests, it is present here. Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment. (Pet.App. p.13).

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... the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

Dolgencorp notes the statement in *Plains Commerce* that "a business enterprise employing tribal members ... *may* intrude on the internal relations of the tribe or threaten self-rule" and that "[t]o the extent [it does], [its] activities ... may be regulated." 554 U.S. at 334-35, 128 S.Ct. 2709 (emphasis added). This statement expresses nothing more than the uncontroversial proposition that a tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members. However, such a limitation is already built into the first *Montana* exception. Under that exception, the tribe may

> only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members. (*Id.* at pp.16-17).

There is nothing surprising, unprecedented, or after-the-fact about anything in the Fifth Circuit's ruling.

(3) This Court long ago recognized that private party tort suits for damages authorized under local (common) law amount to a form of government regulation—equivalent to positive law. *San Diego Building Trades Council v. Garmon,* 389 U.S. 235, 795 S.Ct. 773 (1959); *accord, Kurns v. Railroad Friction Products Corporation,* 132 S.Ct. 1261, 1269-1270 (2012). And, as noted above, this Court recognized in *Neztsosie, supra* at 482, n.4 (as acknowledged by *Hicks, supra* at 369) that there was little doubt that the tribal court would have had jurisdiction over the tort claims there at issue but for a supervening federal statute which reflected Congressional intent that all tort claims derivative of uranium mining be heard in the federal courts; and, in both *National Farmers Union* and *Iowa Mutual* the non-Indian parties were required to exhaust their tribal remedies in re tort claims filed against them by tribal members because the tribal courts had "colorable jurisdiction" over those tort claims.

Accordingly, every federal circuit which has considered the issue has ruled that tort claims against non-Indian parties anchored in consensual relationships otherwise satisfying *Montana* and the nexus test may be adjudicated in tribal courts to the same extent as contract or statutory claims, absent

federal statutes to the contrary. (Pet.App., p.11, n.3; *see,* pp.17-19, *supra*).

No traditional tribal tort law which could be pled in this case has been identified and no such claims have been pled; but, even if traditional tribal law were brought to bear upon such claims, that prospect is plainly spelled out in §1-4-4 of the Choctaw Tribal Code (*see,* n.6, *supra*), putting all who do business on the Choctaw Reservation on notice of this fact; and, applying traditional law is simply another manifestation of the tribes' right to "make their own laws and be ruled by them" under *Williams v. Lee, supra* at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there").

Here, all the tort claims pled are based on Mississippi law as incorporated into the Choctaw's tribal law. *Ferrell v. Shell Oil Co.,* 1996 WL 75586 (E.D.La.1996) (employer's vicarious liability for co-employee torts); *Goodman v. Coast Materials Company,* 858 So.2d 923 (Miss. App. 2003) ("After Newell there is still a recognized right to bring a civil suit against an employer for some intentional torts committed by co-employees..."); *Gulledge v. Shaw,* 880 So. 2d 288 (Miss. 2004); *Davis v. Pioneer, Inc.,* 834 So.2d 739 (Miss. App. 2003) (tort claim seeking damages not compensable under state workers compensation law for injuries caused by co-employee assault and battery, not barred by workers compensation law).

Finally, Petitioners recognized in 2003 that it was a foreseeable risk that its employees and supervisors might violate company rules, including company rules

on employing minors or sexually assaulting co-employees.[31]

If in some other case legitimate concerns regarding the application of unwritten tribal law arise, those concerns can be dealt with then.

IV. Petitioners' Speculation Regarding An Explosion Of Tribal Court Tort Claims Is Unfounded

Petitioners suggest that allowing the Fifth Circuit's ruling to stand will subject the many casual, non-Indian, recreational visitors to reservations in the Fifth Circuit (or elsewhere) to a litany of tort claims in tribal court. (Pet., pp.6-7). This is vastly overstated and no evidence supporting this speculation is provided. The absence of the requisite consensual relationship and/or the required nexus between a qualifying consensual relationship and the potential tort claims to which Petitioners refer will bar the exercise of tribal court jurisdiction over non-Indian defendants in virtually all circumstances for those kinds of tort claims. Under the Fifth Circuit's ruling, tribal jurisdiction is not sustainable over a non-Indian defendant solely because he committed a tort on the reservation harming a tribal party. Pet.App., pp.16-17; *accord, Wilson v. Marchington,* 127 F.3d 805, 815 (9th Cir. 1997).

Further, virtually all work related common law tort claims that tribal member employees might otherwise seek to file against their non-Indian employers will be barred by workers compensation laws, where those employers participate in workers' compensation

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[31] Vol. 1 USCA5 pp.920-926 (Exhibit 3).

programs, as is common in Indian Country. *See, Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982) (40 U.S.C. §3172 authorized application of Arizona's workers' compensation statute to injuries that Indian employees of a non-tribal owned mining company sustain on Navajo reservation); *Hamby v. Cherokee Nation Casinos*, 231 P.3d 700, 702 (Okla. 2010) (40 U.S.C. §3172 authorizes extension of state workers; compensation laws to employers on Indian reservations, but does not waive tribal sovereign immunity to compel tribal governments themselves to participate in such programs); *accord, Swenson v. Nickaboine*, 793 N.W.2d 938 (Minn. 2011). *Howard Delivery Serv., Inc. v. Zurich Ins. Co.*, 547 U.S. 651, 655 (2006). The present case (because it involves an intentional co-employee tort) is the rare exception which proves the rule. *See*, authorities cited at p.29, *supra*. Further, *Neztsosie* makes clear that employee claims for injuries at uranium mines cannot be tried in tribal courts.

V. Petitioners' Arguments Regarding Due Process And Punitive Damages Are Overblown

Petitioners (Pet., pp.20-21) speculate that allowing tribal courts to decide tort claims grounded in *Montana's* first exception will give rise to reams of judgments evidencing rampant violations of due process and unfairness to non-Indian parties. This is the sheerest of speculation. Petitioners do not claim that any due process violations have occurred in this case. If this Court chooses to consider the important question of whether the *Montana* framework should be revised to limit tribal court jurisdiction due to concerns

regarding tribal court bias or due process violations, it should do so in a case evidencing such concerns. This is not that case. (Pet.App., p.18, n.6). The very reason this court frequently denies *certiorari* in cases at an interlocutory stay is to avoid ruling on important legal issues based on hypotheticals and speculation about what might happen somewhere at some time in the future, instead of what has happened in a particular case that is before the Court. *Hamilton-Brown Shoe Co., supra; see,* Part II, p.19, *supra.*

The Choctaw courts are subject to a judicial code of ethics[32] and have a history of enforcing core due process principles against the tribe's own government,[33] as they are required to do by 25 U.S.C. §1302 and the Tribe's own Constitution. (Pet.App., pp.18, n.6 and 81). There is no evidence here of any tribal government political interference in any civil case before those courts. Hence, Petitioners' speculations have no foundation in this record. This Court should decline Petitioners' invitation to curtail tribal court jurisdiction as now authorized under *Montana's* first exception based on hyperbole and speculation. If in this, or a different case, after trial any serious due process violations occur, this Court will have the opportunity to grant *certiorari* and examine the issues there presented based on what really happened. *United States v. Virginia,* 518 U.S. 515 (1996).

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[32] Choctaw Tribal Code, Sec. 1-6-7–Ethics Provisions.

[33] *Wanda Sharp v. Mississippi Band of Choctaw Indians,* No. S.C. 2002-02 (enforcing due process guarantees against the Tribe).

Petitioners also urge that non-Indians have no practical protection from rogue money judgments that might someday be entered in tribal courts violative of fundamental due process principles. (Pet., pp.17-23). Aside from this Court's rule that speculation about tribal court bias is not a valid ground for avoiding tribal court jurisdiction (*Iowa Mutual, supra*), and the existence of a tribal court's duty to adhere to core due process principles (Pet.App., p.18, n.3), Petitioners are otherwise mistaken. To convert tribal court money judgments into money requires enforcement—typically in off-reservation state or federal courts via comity principles. It is well-settled that those courts will not enforce tribal court money (or other) judgments issued in circumstances violative of due process. *Wilson, supra* at 813 ("...Tribal Court proceedings must afford the defendant the basic tenants of due process or the judgment will not be recognized by the United States"); *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (2001) (refusing to recognize tribal court judgment entered in circumstances evidencing bias and violation of due process); *Burrell v. Armijo, supra* at 1171 1172 (federal court should not recognize tribal court judgment entered in violation of due process requirement that litigant had "a full and fair opportunity to litigate its cases (citing *Kemer v. Chern Const. Corp.*, 456 U.S. 461...(1982)"); *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir.2007) ("...recognition of a tribal court judgment *must* be refused...where the party against whom enforcement was sought was not afforded due process of law) (emphasis added).

These rulings send a strong message to tribal courts, tribal court parties and to the tribal

governments that tribal courts have a fundamental duty to enforce core due process principles as required by the Indian Civil Rights Act, 25 U.S.C. §1302. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978):

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

This kind of federal court judicial oversight serves both to further those core principles and to strengthen tribal courts, an objective this Court and the Congress have supported. *Iowa Mutual, supra* at 14-15 ("[T]ribal Courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development").

Finally, as the Fifth Circuit correctly ruled, assessment of punitive damages in civil cases do not involve the exercise of criminal jurisdiction.[34] (Pet.App.,

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[34] This Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978) held that tribal courts do not possess any retained (inherent) sovereign authority to exercise criminal jurisdiction over non-Indians; but, then in *Montana* and its progeny has ruled that there are circumstances where Indian tribes can properly exercise civil jurisdiction over non-Indians. The *Oliphant* bar to exercise of criminal jurisdiction says nothing about whether tribal courts can properly adjudicate tort claims against non-Indians in the circumstances involved in this case.

pp.20-22). If and when an assessment of punitive damages by a tribal court transgresses this Court's substantive due process limitations on punitive damages, *see, BMW of North America v. Gore,* 517 U.S. 559 (1996), the tribal appellate courts and the federal courts (after exhaustion of tribal remedies) can address those circumstances; and, the non-Indian parties involved will have a clear duty to first raise and litigate those issues in the tribal courts. *National Farmers Union*; *Iowa Mutual.*

VI. Petitioners' Reservation "Poverty" Argument Is Misplaced

Petitioners' "reservation poverty" argument was not raised below; hence, there is nothing of record bearing on it. Petitioners (Pet., pp.17-18) and *amicus* South Dakota Banker's Association (Am.Br., pp.6-8) nonetheless argue that leaving the Fifth Circuit's ruling intact will exacerbate on-reservation poverty. The Mississippi Choctaw experience is to the contrary. The Choctaw Courts routinely exercise jurisdiction over non-Indian plaintiffs and defendants per *Montana*; and, yet—a decade after the Fifth Circuit's rulings in *TTEA* and *Bank One*, and after this Court's rulings in *Strate* and *Neztsosie*, the Tribe continues to be the third largest employer in Mississippi. Mississippi Blue Book, Official and Statistical Register (2008-2012); *see,* Rezek and Millea, "Economic Impacts of the Mississippi Band of Choctaw Indians on the State of Mississippi," p.1 ("Outside of its own activities, MBCI supports 350.3 million in economic activity, 6,062 jobs, 221.7 million in GSP and 142 million in personal income for the State..."). The Tribe has had no difficulty in attracting private capital ($400 million plus) to its reservation

over the last 40 years—including bank financing for a new $55 million on-reservation tribal hospital construction project started in 2013—and has drastically reduced its reservation poverty and unemployment levels over that same period. Murray, "Analysis of the Labor Market on the Mississippi Choctaw Indian Reservation," Mississippi Cooperative Extension Service (Sept. 13, 1983); U.S. Census Bureau—Selected Economic Characteristics (2008-2012) for Mississippi Choctaw Reservation Communities.

Further, just as with the similar arguments regarding the economic wisdom of tribes invoking sovereign immunity as a defense to unconsented civil suits for on or off-reservation transactions (and the public policy judgments involved in predictions about the long term economic consequences of such decisions), the reservation poverty arguments which Petitioners and the bank association believe should bear upon the *Montana* jurisdiction framework requires legislative judgments which should be left to the tribes and the Congress. *See, Kiowa Tribe v. Manufacturing Technologies,* 523 U.S. 751 (1998) (ruling that Congress, rather than this Court, was the proper forum for addressing issues regarding the wisdom of continuing the recognition of tribal sovereign immunity for on or off-reservation transactions); *accord, Michigan v. Bay Mills Indian Community,* 572 U.S. __, 134 S.Ct. 2024 (2014) (declining to revisit question whether tribal sovereign immunity defense should be recognized for off-reservation transactions). Wading into this public policy thicket would push the Court far beyond its judicial role of deciding concrete

cases that come before it based on the facts involved in those cases.

Ultimately, absent Congressional action to the contrary, it remains a tribal choice whether to authorize their courts to exercise the full range of jurisdiction permitted by *Montana*. If and when a tribe determines that doing so will cause economic harm to its reservation community, it will be free to restrict the jurisdiction of its courts accordingly. Absent action by the Congress to address this issue, these kind of judgments must be left to the tribes on their reservations in exercise of their inherent right "to make their own laws and be ruled by them."

CONCLUSION

The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The parties agree the decision below exposes every employer on an Indian reservation to suit in tribal court for any claim arising from the employment relationship, including claims for millions of dollars in punitive damages. *See* BIO 2, 8-9. Respondents acknowledge that the Fifth Circuit's decision thus squarely presents the same question this Court granted certiorari to decide, but did not reach, in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008). *See* BIO 1. Moreover, respondents do not dispute that in asking whether tribal courts may adjudicate tort claims against nonmembers pursuant to their authority under the first *Montana* exception,[1] this case presents a subset of the broader question left open in *Nevada v. Hicks*, 533 U.S. 353 (2001) – namely, whether tribal courts may *ever* adjudicate claims against nonmember defendants. *See* BIO 20. So the burden on respondents is to show why this Court, having *already* decided that the Question Presented warrants review, should nonetheless deny certiorari. Respondents' brief in opposition fails to provide a convincing answer.

Respondents say there is no circuit conflict (BIO § I), but there was no circuit conflict alleged in *Plains Commerce Bank* either; rather, the question raises a foundational and recurring issue regarding the relationship between Indian tribes and the state and federal governments – highlighted in the sharp

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[1] *See Montana v. United States*, 450 U.S. 544, 565 (1981).

dissent from rehearing en banc. *See* Pet. App. 93-95. Respondents argue that the case is interlocutory (BIO § II), but that is not true (there will be no further federal proceedings in this case) and this Court regularly grants certiorari to resolve questions of tribal jurisdiction in cases in the same posture.[2] Respondents suggest that the Court has already decided, for some unidentifiable reason, to leave the *Plains Commerce Bank* question open, having "declined an invitation to rule on the question" in a petition from 2011. BIO 1. But that case did not present the *Plains Commerce Bank* question – having been resolved under the second *Montana* exception, not the first[3] – and the petitioners failed to preserve any broader *Hicks*-related argument.[4]

Instead, respondents' principal claim is that the Court should never have granted certiorari on the

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[2] *See, e.g.*, *Hicks*, 533 U.S. at 357; *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 478-79 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438, 444-45 (1997).

[3] *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 937-41 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011).

[4] The petition there complained, in a single paragraph, that the court of appeals failed to consider the *Hicks*-related question of whether the tribal courts' adjudicative authority extended as far as the tribe's legislative power under the second *Montana* exception. *See* Petition 29, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613). But the respondents pointed out that this was because the petitioners had failed to make any relevant argument on the point below, *see* BIO 36, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613), a point the petitioners did not contest in their reply brief, *see* Reply 4-6, 11, *Attorney's Process*, 131 S. Ct. 1003 (2011) (No. 10-613).

Question Presented in *Plains Commerce Bank*, and that the Court did not know what it was talking about in *Hicks*, because this Court had already decided that that tribes may subject nonmembers to tribal court suit for any tort arising out of a consensual relationship and, more generally, that tribal courts' adjudicative jurisdiction is coextensive with their legislative authority. BIO § III. That would be surprising if true, and it is not. In fact, the question presented in *Plains Commerce Bank* and this case remains undecided and calls out for resolution by this Court.

I. The Petition Presents A Question This Court Correctly Has Deemed Open Under Its Precedents And In Need Of Review.

Respondents assert that, despite having said in *Hicks* that there was an open question whether tribal courts may *ever* exercise adjudicative jurisdiction over nonmembers, in fact "the plain import of this Court's post-*Montana* cases is that the exercise of tribal jurisdiction" is "appropriate" with respect to *any* "civil claims filed by a tribe or its members" arising from "voluntary consensual relationships" on tribal land, so long as there is a sufficient "nexus" between the claim and the relationship. BIO 21. For this proposition they simply list – without explanation, or even pincites – a handful of case names. Respondents' apparent belief that these cases support their claim is wishful thinking.

For example, respondents cite *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), presumably on the

ground that both cases involved tort claims asserted in tribal court. BIO 9-10, 21. But as this Court has explained, all either case held was that objections to colorable tribal court jurisdiction must be exhausted through the tribal system before coming to federal court. *See Strate*, 520 U.S. at 448. Accordingly, "neither [case] establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases." *Id.*; *see also* BIO 9.

Respondents then rely on *Strate* itself, plucking out a quote describing *National Farmers Union* and *Iowa Mutual* as "stand[ing] for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (altered). But as *Hicks* explained, the actual holding in *Strate* is simply that "'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" 533 U.S. at 357-58 (quoting *Strate*, 520 U.S. at 453), a holding that "leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction." *Id.* at 358.[5]

Respondents do no better in relying on *Hicks*'s off-hand description of a footnote in *Neztsosie*, 526 U.S. at 482 n.4. BIO 18-19. They say *Hicks*

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[5] Moreover, even if tribal court jurisdiction "presumptively" follows regu[illegible]ory authority, that does not resolve the Question Presented, [illegible]hich is whether tribes possess that regulatory author[illegible] in the first place when the only basis for regulation is a consensual relationship and the mode of regulation is tort law.

recognized that the tribal court in *Neztsosie* would have had jurisdiction over the tort claims in that case, but for the special preemptive effect of the Price-Anderson Act. BIO 18-19. But *Hicks* clearly was not saying that tribal courts generally have jurisdiction to hear tort claims over nonmembers; a few pages earlier, the Court had gone out of its way to note that there was an "open question" whether tribal courts *ever* have jurisdiction over nonmembers. *See* 533 U.S. at 358. Instead, *Hicks* simply noted that the claims in *Neztsosie* arose under tribal law and therefore were distinguishable from the Section 1983 claims at issue in *Hicks*, which fell outside the scope of tribal court jurisdiction because they are federal claims. *See id.* at 368-69.

II. Respondents' Description Of Lower Court Precedents Is Irrelevant And Incorrect.

Respondents also say that certiorari should be denied because the Fifth Circuit's decision in this case is in accord with uniform circuit precedent recognizing that "tribal courts can exercise civil jurisdiction over tort claims" satisfying the "consensual relation and nexus test." BIO 17-18. That is both irrelevant and untrue.

It is irrelevant because, as respondents themselves emphasize, other than the decision in this case, nothing of relevance has changed the state of circuit precedent since the Court granted certiorari in *Plains Commerce Bank*. BIO 21-22. The Court presumably granted certiorari in that case not because there was a circuit conflict (none was alleged), but because the Eighth Circuit's ruling addressed a foundational question of law and exposed

companies that do business with tribe members on or near reservations to tort suits in tribal court "in vastly expanded circumstances." Petition 9, *Plains Commerce Bank v. Long Family & Cattle Co., Inc.* (No. 07-411) (capitalization altered); *see also id.* 4-15 (alleging no circuit conflict).

The same is true here. As Judge Smith explained, prior to the decision in this case "no circuit court has upheld Indian court jurisdiction, under *Montana*'s first exception, over a tort claim against a nonmember defendant." Pet. App. 28. Respondents' attempts to show otherwise (BIO 17-18) again badly miss the mark.

The first case respondents cite, *Attorney's Process and Investigation Services*, was resolved under the *second* exception in *Montana*, for conduct threatening a tribes political integrity, not the first exception for consensual relationships. *See* 609 F.3d at 937, 941. To be sure, the court stated that it made no difference *under the second exception* whether the claims were brought under "precisely tailored regulations or through tort claims." *Id.* at 938. But that was because jurisdiction was founded on the tribe's right to protect itself (in that case, from a violent attack on its own offices by armed private security agents) rather than on the consent of the defendant sued in tribal court (in which case foreseeability is the critical consideration, *see* Pet. 20-22). *See* 609 F.3d at 938.

The Ninth Circuit's decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), likewise had nothing to do with the first *Montana* exception. Instead, the Ninth Circuit held that a tribe had the power to sue a

delinquent commercial tenant of tribal property in tribal court without having to satisfy either of the *Montana* exceptions under its authority to condition entry on tribal lands. *Id.* at 810-12.[6]

Respondents are also wrong in attempting to imply that the lower courts have resolved the question this Court held open in *Hicks* by permitting tribal court jurisdiction whenever the tribe has legislative authority under *Montana*. *See* BIO 10. To the contrary, none of the cases they cite consider the question, much less permit tort claims against nonmembers in tribal court. *See TTEA v. Ysleta del Sur*, 181 F.3d 676, 684 (5th Cir. 1999) (pre-*Hicks* decision considering suit for declaration that contract was void under federal law, with no discussion of *Hicks* question); *Burrell v. Armijo*, 456 F.3d 1159, 1168-70 (10th Cir. 2006) (contract dispute in which only objection to tribal court jurisdiction was meritless claim of right to arbitrate); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (pre-*Hicks* case resolving contract and ordinance-based claims, with no discussion of *Hicks* question).

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[6] The additional citations following respondents' "accord" signal actually "accord" with the above cases only in the sense that they, too, are completely unsupportive of respondents' claim. *See* BIO 18 (citing the decision this Court reversed in *Plains Commerce Bank*, a prior Fifth Circuit exhaustion decision in which tribal court jurisdiction was not challenged, and an unpublished district court decision).

III. The Question Presented Is Important.

The Court's failure to resolve the questions left open in *Hicks* and *Plains Commerce Bank* has left the law in a state of unpredictable flux, as illustrated by the fissure within the Fifth Circuit exposed by the petition for rehearing. *See* Pet. App. 92-95. That uncertainty has had harmful effects throughout the nation, from Mississippi to South Dakota, in industries ranging from retail to banking. *See* Br. for *Amicus Curiae* South Dakota Bankers Association (SDBA Br.). The longer this Court delays providing guidance, the longer that damaging uncertainty will persist – even a circuit decision directly contrary to the Fifth Circuit's holding in this case will be seen as, at best, a temporary way station for a question everyone expects this Court ultimately to resolve. Meanwhile, the uncertain scope of tribal court tort jurisdiction stands as a deterrent to nonmember participation in the economic life of many tribes. *See id.*

Respondents attempt to diminish the practical significance of the decision below by claiming that it *only* exposes employers to tort suits by their employees. BIO 30. But they offer no explanation why a customer's relationship with a business is any less of a "consensual relationship" than a firm's relationship with its employees. And they do not even attempt to show why the nexus in this case (in which the plaintiff alleges liability for failure to properly hire and train a supervisor, who then allegedly injured a coworker) is materially more direct than the nexus between a customer relationship and all manner of torts, including

accidents that occur while a customer is visiting a store.[7] *See* Pet. 16-17; SDBA Br. 5.

But even if the decision below applied only to employment-related claims, that would be more than sufficient reason to grant review, given the tens of thousands of employment relationships that could give rise to suit, and the broad range of claims (including punitive damages claims) that could be brought in tribal court.

Respondents say this is wrong because state workers compensation laws will somehow preempt tribal law claims in a different sovereign's courts. BIO 30-31. But the cases they cite provide no such guarantee of immunity to tribal jurisdiction.[8] Moreover, even if state law preempts tribal law in

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[7] Indeed, this case itself does not involve a typical employment relationship, as respondent John Doe was a participant in a short-term internship through the Youth Opportunity Program. *See* Pet. App. 3.

[8] *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982), simply held that federal Indian law principles did not preempt a provision of *state* worker's compensation law that eliminated tribal members' *state law* tort claims (filed in *federal*, not tribal, court). It said nothing about whether the state law preempted any tribal law claims the members could have brought in tribal court. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741-45 (Minn. 2011), held that as a matter of state law, workers injured on tribal land can apply for state workers compensation benefits; it said nothing about whether tribal members are precluded by state law from bringing tribal law claims in tribal court instead. And *Hamby v. Cherokee Nation Casinos*, 231 P.3d 700, 702 (Okla. 2010), simply held that tribes themselves retain sovereign immunity from suit under state workers compensation laws.

this context, state law ordinarily precludes only lawsuits for accidental injuries or death occurring in the workplace.[9] An employee therefore retains the right to bring a broad range of common employment claims in court, including, for example, intentional torts, discrimination, defamation, intentional infliction of emotion distress, or wrongful termination. *See generally* WEST WORKERS' COMP. GUIDE § 1:4 (2014).[10] The prospect of having to defend even that more limited subset of claims in the home court of tribal employees will inevitably deter some nonmembers employers from participating in the commercial life of many reservations. *See* SDBA Br. 5-6.

IV. Respondents' Arguments On The Merits Provide No Basis To Deny Review.

Finally, given the need for clarity from this Court, respondents' defense of the decision below on the merits would provide no reason to deny review even if convincing. But the arguments are unconvincing in any event.

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[9] *See, e.g.*, Miss. Code Ann. §§ 71-3-3(b), 71-3-7(1); Tex. Lab. Code §§ 401.011(26), 406.031; La. Rev. Stat. §§ 23:1021(8)(a), 23:1031(A).

[10] In addition, some states, including Texas in the Fifth Circuit, make employers' participation in workers compensation optional. *See generally* 1 MODERN WORKERS COMP. § 101:1 (2014); Tex. Lab. Code § 406.002(a). In addition, Texas and other states allow workers to opt-out of the workers compensation regime. *See* 1 MODERN WORKERS COMP. § 101:1 (2014); Tex. Lab. Code § 406.034(b); *Begay*, 682 F.2d at 1318 n.2 (same for Arizona).

Respondents say, for example, that this Court has "recognized that private party tort suits for damages . . . amount to a form of government regulation." BIO 28. Petitioners do not dispute that. The question is whether tort suits are the kind of regulation this Court contemplated when it established the "consensual relation" exception in *Montana*. As explained, regulation by tort litigation cannot be reconciled by the theory underlying the exception. *See* Pet. 20-22.

Respondents argue that tort litigation is not materially different from regulation under a contract or statute because a statute can be amended and statutory changes can have "bearing on contract disputes." BIO 25. But the point is that foreseeability of tort law is even worse because in addition to being subject to change, it is difficult to discern even in its current form when a nonmember decides whether to engage in a commercial relationship with tribe members. This also belies respondents' assertion (BIO 29) that all of their claims arise under Mississippi law; in fact, the section of the Choctaw Tribal Code cited by respondents provides that state law shall only apply if neither federal law nor the "ordinances, customs, and usages of the Tribe" govern – but it is far from clear that such is the case here. *See* Choctaw Tribal Code § 1-4-4, *reproduced at* BIO 3 n.6.

Lastly, respondents' emphasis on the safeguards in place in the Choctaw tribal court system (BIO 31-32) misses the point. Petitioners' argument is *not* that tribal courts pervasively violate litigants' constitutional rights, any more than diversity jurisdiction is premised on a fundamental disrespect

for state courts. Instead, the presumption is that when a defendant is sued in the courts of sovereign to which the plaintiff belongs and the defendant does not, the defendant should have the opportunity to require that the litigation be conducted in the courts of a sovereign to which both parties belong. In the case of diversity jurisdiction, that means litigation in the courts of the United States. In a case like this, that means the state court if both parties are citizens of the state, or federal court if the parties' citizenship is diverse. Congress remains free to adopt a different rule, but until it does, petitioners are entitled to avoid tort suit in the courts of the plaintiff's tribe.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 2, 2014

AMICUS CURIAE BRIEF

No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL., PETITIONERS

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a tribal court has jurisdiction under the consensual-relationship exception in *Montana* v. *United States*, 450 U.S. 544, 565 (1981), to adjudicate civil tort claims brought by tribal members against a nonmember corporation that operates a store on tribal trust land pursuant to a lease with, and business license from, the Tribe, when the claims arise from the store manager's alleged sexual assaults upon a tribal member who was, pursuant to an agreement with the Tribe, working at the store as an intern.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This Court has recognized that Indian tribes "retain considerable control over nonmember conduct on tribal land." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997). As "a general rule," however, "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. Those exceptions, articulated in *Montana* v. *United States*, 450 U.S. 544 (1981), provide (1) that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers

who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566. "[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate*, 520 U.S. at 453 (brackets and internal quotation marks omitted).

2. Petitioners are a Tennessee corporation and its wholly owned subsidiary. Pet. ii; D. Ct. Doc. 1, at 1 (Mar. 10, 2008) (Compl. ¶ 2). The subsidiary, Dolgencorp, LLC, operates a Dollar General Store on land held in trust for, and within the Reservation of, the Mississippi Band of Choctaw Indians (the Tribe). Pet. App. 2. Dolgencorp operates the store pursuant to a business license issued by the Tribe and has leased the premises since 2000 from an entity owned by the Tribe. *Id.* at 2, 84; D. Ct. Doc. 1-2, at 35.

In the lease, Dolgencorp "acknowledges" that the premises "are upon land held in Trust by the United States of America for the [Tribe]" and that Dolgencorp "will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose." D. Ct. Doc. 1-2, at 51-52 (Provision XXIX). The lease provides that Dolgencorp "shall * * * comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." *Id.* at

49-50 (Provision XXVIII). The lease further provides that "[t]his agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi"[1]; that "[e]xclusive venue and jurisdiction shall be in the Tribal Court"; and that "[t]his agreement and any related documents is [*sic*] subject to the Choctaw Tribal Tort Claims Act." *Id.* at 51 (Provision XXVII).

In spring 2003, the store's non-Indian manager, Dale Townsend, agreed that the store would participate in the Tribe's Youth Opportunity Program, which places young tribal members in short-term positions with local businesses so that they can obtain job training and mentorship in return for free labor. Pet. App. 2-3, 5. Respondent John Doe, a 13-year-old tribal member, participated in the Youth Opportunity Program at the store. *Id.* at 3. He alleges that while he was working in the store on July 14 and 15, 2003, Townsend made multiple uninvited sexual advances against him, offering him money to allow the advances, grabbing him "in his crotch area" until he escaped, and thereafter continuing to make sexually offensive remarks. D. Ct. Doc. 1-2, at 6-7 (Tribal Ct. Compl. ¶¶ IV-V). In light of those allegations, the Tribe sought an order from the Choctaw Tribal Court excluding Townsend from the Reservation, and, with Townsend's consent, the court entered such an order in September 2003. *Id.* at 16-19; Pet. App. 57.

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[1] Section 1-1-4 of the Tribal Code (2013), generally provides that, in civil actions, "[a]ny matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi." The entire code is available at www.choctaw.org/government/court/code.html.

3. a. In January 2005, Doe, by and through his parents (who are also tribal members), filed a complaint against Townsend and Dolgencorp in the Civil Division of the Choctaw Tribal Court, seeking compensatory and punitive damages for severe mental trauma resulting from the alleged assaults. Pet. App. 3, 77. The complaint claims that Dolgencorp is vicariously liable for Townsend's actions and that it was negligent in hiring, training, or supervising him. *Id.* at 3. The tribal court denied the defendants' motions to dismiss the complaint for lack of jurisdiction under *Montana*. *Ibid.*

b. On interlocutory appeal, the Choctaw Supreme Court agreed. Pet. App. 75-91. Although *Montana* had originally applied only to activities on non-Indian fee lands, the court concluded that *Nevada* v. *Hicks*, 533 U.S. 353 (2001), had "morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons*, where place was still relevant, but not determinative or dispositive." Pet. App. 82-83. The court held that the tribal court had jurisdiction under both *Montana* exceptions. *Id.* at 82-90. With respect to the first exception—which applies to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565—the court identified three consensual agreements between Dolgencorp and the Tribe: the lease, the business license authorizing operation of the store, and the agreement to participate in the Youth Opportunity Program. Pet. App. 86. The court found that there was a "considerable nexus between the alleged tort and the commercial lease" because the tort was committed by the manager of the leased premises, *ibid.*, and that the nexus was made

tighter because the victim was not simply a customer or employee but a "[t]ribal minor placed at the store by the Tribe to receive job training," *ibid.*[2]

4. Petitioners and Townsend then filed this action in the United States District Court for the Southern District of Mississippi, seeking injunctive relief barring the tribal-court proceedings. Pet. App. 55. The court granted a permanent injunction as to Townsend, finding that he was not a party to any consensual relationship sufficient to support tribal-court jurisdiction. *Id.* at 71-73. Following discovery, the parties filed cross-motions for summary judgment. *Id.* at 39-40. They agreed that, because the tribal-court defendants are nonmembers, one of *Montana*'s "two exceptions must apply in order for the Tribe to assert regulatory authority over their actions." *Id.* at 43.

The district court held that the case against petitioners falls within *Montana*'s consensual-relationship exception. Pet. App. 45-54. The court found a consensual relationship by virtue of petitioners' agreement to participate in the Youth Opportunity Program, pursuant to which Doe "functioned as an unpaid intern or apprentice" providing "free labor" to petitioners, and found that petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. The court fur-

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[2] The Choctaw Supreme Court rejected Dolgencorp's contention that the request for punitive damages presents due process concerns under the United States Constitution. Pet. App. 90. It explained that the relevant proscriptions on excessive punishment are contained in the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(a)(8), and in the Tribe's Constitution, and that the tribal courts are "available to vindicate" those rights. Pet. App. 90 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978)).

ther concluded that Doe's claims "arise directly from this consensual relationship" and therefore provide "a sufficient nexus between the consensual relationship and exertion of tribal authority." *Ibid.*

5. a. The court of appeals affirmed. Pet. App. 1-22. In finding *Montana*'s consensual-relationship exception applicable, the court rejected five arguments made by petitioners. First, it found that, although the consensual relationship need not be a "commercial" one, the relationship between petitioners and the Tribe was "unquestionably" commercial in nature. *Id.* at 12.

Second, the court of appeals identified an "obvious" nexus between petitioners' consensual participation in the Youth Opportunity Program and Doe's tort claims, because the Tribe was regulating "the safety of the child's workplace." Pet. App. 13. The court concluded that it "makes no difference" that "the regulation takes the form of a tort duty that may be vindicated * * * in tribal court." *Ibid.* To the extent "foreseeability" is relevant, the court observed it "would hardly be surprising" that an employer would "have to answer in tribal court for harm caused to the child in the course of his employment," and, more specifically, that petitioners could have easily anticipated that sexual molestation of an intern by a store manager "would be actionable under Choctaw law." *Id.* at 13-14 & n.4.

Third, the court of appeals rejected petitioners' contention that *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), had limited tribal-court jurisdiction to situations where "one specific relationship, in itself" (Pet. App. 16)—such as the single employment relationship between Doe and Dolgencorp—can be shown to "intrude on the internal relations of the tribe or threaten tribal self-rule."

Plains Commerce Bank, 554 U.S. at 334-335. The court explained that "at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." Pet. App. 16-17.

Fourth, because the argument was asserted for the first time on appeal and therefore waived, the court of appeals declined to entertain petitioners' contention that Doe failed to allege and prove that the negligent hiring, training, or supervision of Townsend had occurred on the Reservation. Pet. App. 19-20.

Fifth, the court of appeals held that, even though tribes generally lack criminal jurisdiction over non-Indians, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978), they are not "categorically prohibited from imposing punitive damages on non-members," because punitive damages are distinct from criminal punishment. Pet. App. 20-22.

Finally, the court of appeals responded to statements in the dissenting opinion. As relevant here, it noted that no circuit court has held or suggested that "tort claims are not allowed" or that they "should be treated differently from other types of regulation of non-member conduct." Pet. App. 11 n.3.

b. Judge Smith dissented. Pet. App. 22-36. In his view, there was no need to address the *Montana* exceptions "[b]ecause Dolgencorp's conduct indisputably falls outside the [Tribe's] authority to 'protect tribal self-government or to control internal relations.'" *Id.* at 27 (quoting *Montana*, 450 U.S. at 564). Judge Smith further reasoned that, even if the consensual-relationship exception does apply, there was no "legally sufficient nexus between Dolgencorp's participation in a short-

term, unpaid internship program and the full body of Indian tort law." *Id.* at 28. He concluded that tribes' adjudicative jurisdiction should be construed more narrowly than their legislative jurisdiction because "*Montana*'s first exception envisages discrete regulations consented to *ex ante*" rather than an "after-the-fact imposition of an entire body of tort law." *Id.* at 32.

c. The court of appeals denied rehearing en banc, over the dissent of Judge Smith and four other judges. Pet. App. 92-95.

DISCUSSION

The court of appeals correctly concluded that the tribal court has jurisdiction over the claims here, which are based on conduct that occurred on tribal trust land and arose from petitioners' operation of a store pursuant to a lease with, and business license from, the Tribe, as well as from the store's voluntary participation in the Tribe's Youth Opportunity Program.

Rather than repeat the arguments they advanced in the court of appeals, petitioners now contend (Pet. 18) that tribal courts universally "lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress." There is no foundation in this Court's cases for that categorical prohibition, and it has not been endorsed (or even suggested) by any court of appeals. To the contrary, courts have repeatedly resolved questions about tribal-court jurisdiction without proposing that different rules apply to tort claims. Thus, as petitioners concede (Cert. Reply Br. 5-6), there is no conflict in the circuits. And petitioners' concerns about potential unfairness in tribal-court proceedings, and about the chilling effect that jurisdictional uncertainty may have on commerce with tribes, can be addressed without the novel and categor-

ical curtailment of tribal-court jurisdiction that petitioners now urge. The Court should deny certiorari.

A. The Court Of Appeals Correctly Held That The Tribal Court Has Jurisdiction To Adjudicate The Claims Against Petitioners

Petitioners contend (Pet. 14-15, 20-21) that the court of appeals erred in holding that there is tribal-court jurisdiction over the claims against them under the consensual-relationship exception to the general rule in *Montana* v. *United States*, 450 U.S. 544 (1981). In the circumstances of this case, the tribal court has jurisdiction over the claims against petitioners because the allegedly tortious conduct occurred on tribal trust land and arose from a consensual relationship that satisfies *Montana*'s first exception. Under that exception, an Indian tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Moreover, petitioners' specific entreaty—that the Court find the first exception inapplicable by establishing a novel and sweeping bar on tribal-court adjudication of any "private tort claims against nonmembers," Pet. 18—is inconsistent with *Montana*'s essential concern about protecting tribal self-government and the health and welfare of the tribe.

1. In this case, the parties and the courts below have generally assumed that any tribal-court jurisdiction over petitioners, as nonmembers, must satisfy one of the *Montana* exceptions. See Pet. App. 9-10, 42-43. In the United States' view, however, jurisdiction would be appropriate on the basis of a determination that, to the extent that the tortious conduct at issue here oc-

curred at petitioners' store on tribal trust land,[3] the Tribe had jurisdiction to regulate that conduct without regard to *Montana*'s general rule or its exceptions.

The *Montana* Court "readily agree[d]" that a tribe may regulate nonmembers' activities "on land belonging to the [t]ribe or held by the United States in trust for the [t]ribe." 450 U.S. at 557. The rest of the Court's discussion in *Montana*—including the general rule limiting tribal authority over nonmembers' activities and its two exceptions—applied to the "remain[ing]" dispute about activities on "land owned in fee by nonmembers of the [t]ribe." *Ibid.* Thus, *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), described *Montana*'s "main rule and exceptions" as "[r]egarding activity on non-Indian fee land." *Id.* at 453. And the Court found *Strate* to be "govern[ed]" by *Montana* only because it determined that the stretch of state highway at issue (the location of an accident giving rise to tort claims) was "equivalent, for nonmember governance purposes," to "land alienated to non-Indians." *Id.* at 454, 456; see *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 654 (2001) (referring to "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land").

Although *Nevada* v. *Hicks*, 533 U.S. 353 (2001), later stated that *Montana* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land," *id.* at 360, the Court still acknowledged that a tribe's ownership and control of the land on which the

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[3] Petitioners forfeited any argument that their allegedly negligent conduct might have occurred somewhere else. Pet. App. 19-20. They do not embrace the suggestion in Judge Smith's dissent that resolving that question would "require[] no factual development." *Id.* at 34.

activities in question occur is a "significant," and may sometimes be a "dispositive," factor, *id.* at 370-371. The Court held that such ownership was not sufficient to establish tribal jurisdiction in the narrow context of that case, which involved the activities of state law-enforcement officers executing search warrants relating to off-reservation violations of state law. *Ibid.*

Most recently, although the Court similarly described *Montana*'s rule in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 330 (2008), it also reiterated that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation" and noted that a tribe loses "plenary jurisdiction" over tribal land if it is "converted into fee simple." *Id.* at 327, 328. The Court thus explained that, in addition to their "interests in protecting internal relations and self-government," tribes retain "inherent sovereign authority to set conditions on entry" and otherwise "superintend tribal land," *id.* at 336, 337.

Tribal-court jurisdiction in this case could be predicated on a conclusion that *Montana*'s general rule limiting tribal regulatory authority does not apply to claims such as those at issue here, which are brought against private defendants and arise out of an ongoing business on tribal trust land pursuant to a lease and license from the Tribe.[4] Even so, it would require a

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[4] See *Water Wheel Camp Recreational Area* v. *LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that a "tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*," where the nonmembers' activity "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play").

departure from the Court's normal practice to address that argument as a distinct ground of decision in the context of this case, in which that argument was not pressed or passed upon in the court of appeals. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992).[5]

2. In any event, assuming (consistent with the posture of the case) that tribal-court jurisdiction in this case must satisfy *Montana*'s consensual-relationship exception, the court of appeals correctly held it has been satisfied. And in assessing the application of that exception, the occurrence of the conduct on tribal trust land is, at the very least, highly relevant.

Petitioners do not dispute that they had a consensual relationship with the Tribe. That relationship was reflected in the lease for the store's premises, which specifically provided that Dolgencorp was required to comply with current and future federal and tribal law; it was reflected in the business license that Dolgencorp obtained from the Tribe to operate the store; and it was reflected in the agreement to participate in the Tribe's Youth Opportunity Program, which placed a 13-year-old tribal member under the supervision of the store manager. Pet. App. 2-3, 5, 45-46, 86; see pp. 2-3, *supra*.

Nor do petitioners contend (as did Judge Smith's dissent, Pet. App. 22, 24, 27) that protecting a tribal member from sexual molestation while he participated in a program established by the Tribe does not sufficiently "implicate[] tribal governance and internal relations" (*Plains Commerce Bank*, 554 U.S. at 335) to satisfy the *Montana* exceptions. Such an objection would be particularly misdirected in this case, where

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[5] Respondents do suggest in passing (Br. in Opp. 7 n.12) that this could be "an alternative ground supporting the Fifth Circuit's ruling."

the conduct occurred on tribal land and therefore implicated an additional sovereign power recognized in *Plains Commerce Bank*: the power to "manag[e]" or "superintend" tribal land and thus to "set conditions on entry" to that land. *Id.* at 334, 336, 337. Cf. p. 2, *supra* (quoting lease provision reflecting that premises could not be used "for any unlawful conduct or purpose").

Petitioners do contend (Pet. 16, 20) that the court of appeals erred in sustaining tribal-court jurisdiction based on a "logical nexus" between a consensual relationship and the activity the Tribe seeks to regulate. See Pet. App. 17. But the court's discussion belies petitioners' insinuation that a merely "logical" nexus is too abstract or unlimited. See *ibid.* (explaining that the nexus requirement serves as "a limitation" and that "the suit must * * * arise out of th[e] consensual contacts") (citation omitted). Petitioners, moreover, do not contest the court's conclusion that the connection between petitioners' agreement to participate in the Youth Opportunity Program and the alleged torts was "obvious." *Id.* at 13. That conclusion requires no leap from "[a] nonmember's consensual relationship in one area" to "tribal civil authority in another" area. *Atkinson Trading Co.*, 532 U.S. at 656. The victim was no "stranger[]" to the relationship (*ibid.* (citation omitted)) but rather the intended beneficiary of the store's consensual participation in the program.

Petitioners criticize (Pet. 15, 20) what they characterize as the "breadth and dramatic consequences" of the court of appeals' analysis, asserting that it will open the door to "pervasive tort liability against countless business[es] and individuals" in consensual relationships with tribes or tribal members. But petitioners give no reason to think that the tribal courthouse doors

have heretofore been closed to all tort claims against nonmembers—especially ones occurring on tribal land and arising out of ongoing consensual commercial relationships with the tribe.[6]

3. Petitioners instead seek to sidestep the very questions they raised in the courts below by asking this Court to announce that, at least under the consensual-relationship exception, tribal courts *never* have "jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress." Pet. 18, 23-24. There is no foundation in this Court's cases for such a categorical prohibition.

Petitioners ground (Pet. 21) their proposal in Judge Smith's declaration that *Montana*'s reference to tribal regulation "through taxation, licensing, or other means" (450 U.S. at 565) was intended to be limited to "discrete regulations consented to *ex ante*." Pet. App. 32. In their view, "tort claims are vitally different" because "[t]ort law is generally unwritten and often vague." Pet. 21. But contract law is often equally

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[6] See, *e.g.*, *State Farm Ins. Cos.* v. *Turtle Mountain Fleet Farm LLC*, No. 12-CV-94, 2014 WL 1883633, at *11 (D.N.D. May 12, 2014) (holding tribal court had jurisdiction over bad-faith claim against nonmember, whether characterized as contract or tort claim); *Diepenbrock* v. *Merkel*, 97 P.3d 1063, 1064, 1067-1068 (Kan. Ct. App. 2004) (holding tribal court had jurisdiction over wrongful-death and negligence claims against nonmembers for acts in casino on land owned by tribe); *Doe BF* v. *Diocese of Gallup*, 10 Am. Tribal Law 72, 78-80 (Navajo 2011) (holding that tribal-court jurisdiction over personal-injury claims against nonmembers arising from sexual assault would depend on location of conduct and application of *Montana*); *Marathon Oil Co.* v. *Johnston*, No. AP-04-003, 2006 WL 6926419, at *1, *3 (Shoshone & Arapaho Tribal App. Ct. Apr. 6, 2006) (holding tribal court had jurisdiction over negligence claims against nonmember arising from its operation of oil well leased from tribe).

unwritten, and petitioners do not suggest that the consensual-relationship exception precludes breach-of-contract actions.

Moreover, this Court has never indicated that tort claims are categorically different. To the contrary, in *Nevada* v. *Hicks*, *supra*, the Court recognized (in discussing *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999)) that "there was little doubt that the tribal court had jurisdiction over [Navajo] tort claims" arising from nonmembers' uranium mining and processing on tribal lands, until that jurisdiction was withdrawn by Congress. 533 U.S. at 368. And *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985)—the Court's seminal decision concerning exhaustion of tribal-court remedies—considered a personal-injury claim arising from a motorcycle accident and rejected the argument that the tribal court's "civil subject-matter jurisdiction over non-Indians in a case like this" should be "automatically foreclosed." *Id.* at 855. Similarly, both *Strate* and *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), involved tort claims, and in neither did the Court suggest the categorical bar petitioners now urge.

Indeed, precluding tribal-court tort adjudications would directly "infringe[] upon tribal lawmaking authority" by sidelining the very entities, tribal courts, that "are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co.*, 480 U.S. at 16. It is no sound objection that tribal tort law, like state tort law, may be unwritten. Indian tribes have not been divested of the inherent sovereign power to articulate and apply their tort law in a common-law manner. And, if common-law tort obligations were deemed to be intrinsically unenforceable simply because of their unwritten nature,

that would also vitiate any notion that petitioners seek only an analogue to diversity jurisdiction, in which state or federal courts would still be able to apply tribal tort law. See Pet. 17; Cert. Reply Br. 12. Of course, even if such claims could be adjudicated by state or federal courts, barring tribal-court adjudication would still impinge on "the right of reservation Indians to make their own laws." *Strate*, 520 U.S. at 459 (citation omitted); see *Hicks*, 533 U.S. at 361.

In the end, petitioners admit that they do not intend to leave any gap between tribes' regulatory and adjudicative authority; they are instead asking the Court to find that there is no "regulatory authority in the first place when * * * the mode of regulation is tort law," Cert. Reply Br. 4 n.5. Depriving tribes of that quintessentially American form of lawmaking authority—even in circumstances that involve activities on tribal trust land and nonmembers' consensual relationships with the tribe—would unquestionably "threaten tribal self-rule," *Plains Commerce Bank*, 554 U.S. at 335, and therefore defeat an essential purpose of the *Montana* framework. The Court should not accept petitioners' invitation to effect such a sweeping change in the law of tribal-court jurisdiction.

B. There Is No Conflict In The Lower Courts Concerning Petitioners' Proposed Prohibition On Tribal-Law Tort Suits Against Nonmembers

Petitioners correctly concede (Cert. Reply Br. 5-6) that there is no conflict in the lower courts concerning their contention that *Montana*'s consensual-relationship exception categorically precludes adjudication of tort claims against nonmembers. Indeed, petitioners seek to distinguish the cases respondents discuss by contending that none of them actually re-

solved such a question. *Id.* at 2, 6-7. But the Eighth Circuit has concluded that when a tribe has "power under *Montana* to regulate" conduct, it makes no "difference whether it does so through precisely tailored regulations or through tort claims." *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 938 (2010), cert. denied, 131 S. Ct. 1003 (2011).[7] And the courts of appeals have repeatedly resolved various questions about tribal-court jurisdiction without suggesting that tort claims require fundamentally different rules.[8] In any event,

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[7] Petitioners contend (Cert. Reply Br. 2, 6 & n.4) that *Attorney's Process* considered only the second *Montana* exception. But the quoted sentence appeared in the court's general discussion of "[t]he *Montana* exceptions." 609 F.3d at 938. After holding that there was no jurisdiction over a conversion claim under the second exception, the court remanded for the district court to determine whether there was a "sufficient nexus to [a] consensual relationship" to satisfy the first exception with respect to that claim, which it described by referring to the Restatement (Second) of Torts rather than any precisely tailored tribal regulation. *Id.* at 940-941.

[8] See, *e.g.*, *DISH Network Serv. L.L.C.* v. *Laducer*, 725 F.3d 877, 885 (8th Cir. 2013) (requiring exhaustion of jurisdictional question in tribal court because "[i]t is not 'plain' that a tribal court lacks authority to exercise jurisdiction over tort claims closely related to contractual relationships between Indians and non[-]Indians on matters occurring on tribal lands"); *Elliott* v. *White Mountain Apache Tribal Court*, 566 F.3d 842, 845 & n.2, 849-850 (9th Cir.) (finding tribal-court jurisdiction over common-law negligence and trespass claims against nonmember to be sufficiently "plausible" to require exhaustion in the tribal court), cert. denied, 558 U.S. 1024 (2009); *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1062, 1071-1074 (10th Cir. 2007) (finding no tribal-court jurisdiction over tribal members' claims, including several common-law tort claims, against their employer because the alleged consensual relationship was with a state agency, not a private party), cert. denied, 552 U.S. 1181 (2008); *McDonald* v. *Means*, 309 F.3d 530, 538-539 (9th Cir.

petitioners could scarcely justify this Court's review by establishing that only the case below has resolved the question—especially when it did so largely in response to statements in the dissent rather than petitioners' own arguments, see Pet. App. 11 n.3.

Petitioners nevertheless assert that the broad question warrants review here because "[t]he Court '*presumably* granted certiorari" to resolve it in *Plains Commerce Bank* and then failed to do so. Cert. Reply Br. 1, 5-6 (emphasis added); see also Pet. 15.

We do not presume to tell the Court whether it previously determined that the question was certworthy. But we note that the Court may well have granted review not to address a broad question about whether tribes may ever regulate nonmembers via tort law, but instead to decide the narrow question it recited in the opening paragraph of its opinion, which said "[t]he question presented is whether the Tribal Court had jurisdiction to adjudicate a discrimination claim *concerning the non-Indian bank's sale of fee land* it owned." *Plains Commerce Bank*, 554 U.S. at 320 (emphasis added). Indeed, the limited ground of decision in *Plains Commerce Bank* suggests that sweeping pronouncements of the sort petitioners urge are not appropriate for resolution of questions of tribal-court jurisdiction. See *id.* at 330 ("the Tribe lacks the civil authority to regulate the Bank's sale of its fee land"); *id.* at 332 ("*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land."); *id.* at 340 ("The Longs' discrimination claim, in short, is an at-

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2002) (holding, without needing to consider the *Montana* exceptions, that tribal court had jurisdiction over tort claims against nonmembers arising from accident on tribal trust land).

tempt to regulate the terms on which the Bank may sell the land it owns.").

But even if the Court did conclude that the broader question warranted review in 2007, the paucity of cases that have needed to get even close to considering such a question in the intervening years strongly suggests that, in the absence of any conflict, the Court's intervention is unnecessary.[9]

C. Other Mechanisms Can Ameliorate Petitioners' Policy Concerns

Nor do petitioners' policy concerns demonstrate that this Court should establish a blanket prohibition on the application of tribal tort law to nonmembers under the consensual-relationship exception.

1. Petitioners express concern (Pet. 15, 18-19) that, without congressional direction, it is unfair to allow nonmembers to be sued in tribal courts that are not subject to the Due Process Clauses of the Fifth and Fourteenth Amendments. But, as the court of appeals noted, Pet. App. 18 n.6, the Indian Civil Rights Act of 1968 expressly provides that no tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. 1302(a)(8); see also Pet. App. 81 n.4 (quoting identical provision in Tribe's constitution). Congress has spoken still further, find-

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[9] There is potential uncertainty about how to satisfy *Plains Commerce Bank*'s reference to the prospect that activities "may intrude on the internal relations of the tribe or threaten tribal self-rule," 554 U.S. at 335; see Pet. App. 17 n.5, 51 n.2, 53 n.3. But petitioners have abandoned those questions in favor of their argument of first impression that tribal tort law can never be applied to nonmembers (at least under the consensual-relationship exception). Pet. 18, 23-24.

ing that "tribal justice systems" are "the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6). This Court has similarly "rejected * * * attacks on tribal court jurisdiction" predicated on alleged "local bias and incompetence." *Iowa Mut. Ins. Co.*, 480 U.S. at 18-19.[10]

Even so, if a tribal court failed to accord due process to a nonmember defendant in any individual tort case, that failure would, as respondents note (Br. in Opp. 33), likely prevent the plaintiff from having the tribal court's judgment recognized and enforced in a state or federal court. See, *e.g.*, *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001) (holding that tribal court's judgment was not entitled to recognition because its proceedings violated due process).

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[10] Petitioners have made no showing that the facts here support any such concerns. See Br. in Opp. 32. The Choctaw Tribal Code sets forth, *inter alia*, the jurisdiction of the tribal courts (Tit. I, Ch. 2) and the qualifications of tribal judges (Tit. I, Ch. 3), including the requirement that judges be admitted to practice law in Mississippi (§ 1-3-3(2)). As is often the case, the procedural rules (Tit. VI, Ch. 1) are modeled on the Federal Rules of Civil Procedure. See generally Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 734-735 (2006) (discussing tribal-court use of Anglo-American legal constructs and state and federal common law, and concluding that there is little evidence that tribal courts are unfair to nonmembers); *id.* at 739 (noting tribal law "tends to mirror American laws" because tribes "must be able to function in the American political system in a seamless manner"); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

Furthermore, Congress could respond to any actual evidence of harm by providing for review of tribal-court decisions by federal courts, as it has done to some extent in the criminal context. See 25 U.S.C. 1303. Or it could divest tribal courts of portions of their jurisdiction. For instance, as noted above, in *El Paso Natural Gas*, the tribal court had jurisdiction over "Navajo tort law claims for wrongful death and loss of consortium arising from uranium mining and processing" that "occurred on tribal lands," 526 U.S. at 478, 482 n.4, until Congress transformed such claims into federal actions that could be removed to federal court, *id.* at 484-485; see *Hicks*, 533 U.S. at 368. In other words, although petitioners suggest that Congress must affirmatively *confer* tort jurisdiction on tribal courts (Pet. 22, 24; Cert. Reply Br. 12), *El Paso Natural Gas* demonstrates the opposite.

2. Petitioners also speculate that allowing uncertainty about the scope of tribal-court tort-law jurisdiction "stands as a deterrent to nonmember participation in the economic life of many tribes," Cert. Reply Br. 8, potentially costing them business investors and customers, Pet. 17-18. Yet, as respondents note (Br. in Opp. 35-36), the Tribe continues to attract investment and to be one of the largest employers in Mississippi.

In any event, tribes are best suited to determine how best to exercise their sovereign authority so as not to discourage economic activity by non-Indians, especially on tribal lands. For example, if tribes or tribal members wish to promote certainty in their commercial dealings with nonmembers (*i.e.*, in core applications of *Montana*'s consensual-relationship exception), they, like nonmembers, remain free to negotiate appropriate choice-of-law or forum-selection clauses. See p. 3,

supra (quoting provisions in Dolgencorp's lease); see also *Plains Commerce Bank*, 554 U.S. at 346 (Ginsburg, J., dissenting) (noting that bank could have used "forum selection, choice-of-law, or arbitration clauses" to "avoid responding in tribal court or the application of tribal law"); *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 806-807, 815 (7th Cir.) (finding no need to exhaust jurisdictional question in tribal court where contract with tribe-owned corporation provided that it would be construed in light of state law and that venue would lie in state and federal courts), cert. denied, 510 U.S. 1019 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015

AMICUS CURIAE BRIEF

No. 13-1496

In The
Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,

Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR AMICUS CURIAE SOUTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The South Dakota Bankers Association[1] ("SDBA") is a voluntary association of banks doing business in South Dakota. It has 81 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota's nine Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the so-called "*Montana*[2] exceptions" to the general rule that Indian tribes do not have regulatory or civil-adjudication jurisdiction over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.

SUMMARY OF ARGUMENT

Uncertainty as to the rules of the "economic game" leads to reluctance on the part of non-members and off-reservation businesses to transact business

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[1] The parties have consented to the filing of this brief. Amicus sought consent in a timely fashion and received consent from counsel of record for Petitioner and Respondent. A question arose as to whether consent from counsel for Petitioner was correct. Counsel for Petitioner later gave consent. All is on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae SDBA, their members or their counsel made a monetary contribution to its preparation or submission.

[2] *Montana v. United States*, 450 U.S. 544 (1981).

on Indian reservations or with Indians who live on reservations. The reluctance is understandable given the "special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S. 676, 693 (1990). An expansion of the *Montana* exceptions, such as that pronounced by the Fifth Circuit Court of Appeals, to allow tribal courts to exercise civil adjudicatory jurisdiction in circumstances such as those presented in this case will add to that uncertainty and reluctance, the net result of which will be continued economic hardship for those living on and near Indian reservations.

ARGUMENT

As recent events in both our national and world economies have shown, a lack of reasonable predictability as to future events is detrimental to the economy in general and to the credit market in particular. Although admittedly on a smaller scale, uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can result in similarly injurious consequences to reservation Indians and non-Indians alike. The expansion of the so-called "*Montana* exceptions" to include civil-adjudicatory jurisdiction over non-members will add to that uncertainty and ultimately harm local economic development, both on-reservation and off.

The fact that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business on a reservation is well-recognized. As Justice Souter noted

in his concurrence in *Nevada v. Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences given '[t]he special nature of [Indian] tribunals . . . '." 533 U.S. 353, 383 (2001), quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus have little to no impact in changing procedural rules, substantive law or other matters involving Indian tribunals with which they disagree. *See Duro*, 495 U.S. at 679.

The ultimate "practical consequence" of this uncertainty as to the nature and extent of tribal jurisdiction is reluctance on the part of off-reservation businesses to trade on Indian reservations or with tribal members who live on reservations. SDBA submits that the primary reason for that reluctance is the difficulty in determining and understanding "the rules of the game." As Justice Souter stated in *Hicks*,

> [t]ribal law is still frequently unwritten, being based instead on the "values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another" . . . The resulting law applicable in tribal courts is a complex

> "mix of tribal codes and federal, state, and traditional law," . . . which would be unusually difficult for an outsider to sort out.

Hicks, 533 U.S. at 384-85 (Souter, J., concurring) (internal citation omitted).

The confusion resulting from that "complex mix" and from the uncertainty surrounding the interpretation of the *Montana* exceptions is evident in the case at bar. Petitioner is a non-Indian corporation operating on the Choctaw reservation. It was found to be subject to tribal jurisdiction after a minor employee, a tribal member, working at the local Dollar General Store through the tribe's Youth Opportunity Program (YOP), was allegedly molested by the manager. *Dolgencorp Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014). Petitioner argued that under the Court's interpretation in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), the first *Montana* exception does not support tribal jurisdiction because, "[O]nly those consensual relationships that are evaluated and determined to have an impact on tribal self governance or internal relations will trigger tribal jurisdiction." *Dolgencorp*, 746 F.3d at 171. The Court of Appeals rejected Petitioner's argument, and found that nothing in *Plains Commerce Bank* required an additional showing of a specific relationship and because the minor was employed at Dollar General, a relationship of "commercial nature" existed. *Id.* at 173-75. Also, because of Petitioner's participation in the YOP, it had implicitly consented to a consensual relationship as required under *Montana*. *Id.*

SDBA submits that the level of uncertainty regarding the decisional law to be applied is disconcerting. The present case represents the impending demise of the general rule that Indian tribes do not have regulatory or civil-adjudicatory jurisdiction over non-members, and the ruling of the Court of Appeals is an illustration of how the exceptions are now transforming into the rule. The non-conformity and uncertainty with how courts are interpreting *Montana* and its exceptions is discouraging to non-members and off-reservation businesses wishing to explore markets on Indian reservations.

This inability to predict how a tribal court and other courts interpreting the exceptions will rule and on what basis is especially apparent with the Cheyenne River Sioux Tribal courts in South Dakota. In *Thorstenson v. Cudmore*, 18 Indian L. Rep. 6051 (C.R.S.T. App. 1991), the Cheyenne River Sioux Tribal Court of Appeals invalidated a provision of the Tribe's Bylaws that limited tribal jurisdiction over non-Indians on the basis that the Bureau of Indian Affairs had imposed the terms of that provision on the Tribe, and thus the membership had no "meaningful choice" when they voted on the Tribe's Constitution and Bylaws. *Id.* at 6053. Carried to its logical extreme, that line of reasoning could lead to the invalidation of the entirety of the Tribe's Constitution and Bylaws if the Tribal Court of Appeals concluded the membership had no "meaningful choice" when they voted.

SDBA's member banks do business on Indian reservations and with tribal members living on

reservations.[3] They do so because it presents a business opportunity for them and the communities they serve. However, other businesses in the communities served by SDBA's members limit the amount of business they do on-reservations not because of their race, but rather because the risk associated with not knowing the rules before the game begins simply outweighs the potential economic benefit to them[4] and the greater economy, both on-reservation and off-reservation.[5]

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[3] SDBA members operate at least nine main office or branch banks on Indian reservations. Numerous additional banks are located near reservations or on or near "disestablished" or "diminished" reservations. *See DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975) (holding that Lake Traverse Indian Reservation had been "terminated and returned to the public domain").

[4] Describing the reasons for the lack of any meaningful flow of capital onto South Dakota's Indian reservations, a 2003 article in the University of South Dakota Business Research Bureau's "South Dakota Business Review," stated that "[w]hat is missing in many cases is very fundamental, that is, the *rule of law*." Brown & Selk, *Economic Trends on the American Indian Reservations in South Dakota*, 41 S.D. Business Review 4, p. 14 (June 2003) (emphasis added).

[5] This uncertainty is not strictly limited to that relating to the "rules of the game" imposed by Indian tribes. Like the Cheyenne River Sioux Tribe, many of South Dakota's Indian tribes have prohibited the use of so-called self-help repossession. *See Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878, 882 (8th Cir. 2007). Creditors may use "self-help repossession" elsewhere in South Dakota, S.D. Codified Laws Ann. § 57A-9-609(b), and it is generally available throughout the United States. U.C.C. § 9-609(b). Insofar as certain easily-moveable chattels, such as motor vehicles, furniture and appliances are concerned, the use of self-help repossession can

(Continued on following page)

The need for more trade with reservation Indians is dramatically demonstrated by a comparison of net income and poverty levels on and off South Dakota's Indian reservations. Bureau of Economic Analysis data for 2012 show average per capita personal income of $37,384 and $23,467 for the two counties that make up the Cheyenne River Sioux Reservation, while the averages for the three non-reservation counties directly to the east are $41,474, $75,759, and $105,502. The 2012 average per capita personal income for South Dakota as a whole, on the other hand, was $45,381. U.S. Dept. of Commerce, Bureau of Economic Analysis, *available at* http://bea.gov/regional/bearfacts/countybf.cf.

According to the 2012 census, 35.7% of those living on the Cheyenne River Sioux Reservation were at or below the poverty level – nearly three times the 13.8% of South Dakota as a whole. United States Census Bureau, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml#none. If

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greatly reduce the cost of liquidating collateral in the case of default. However, when some banks doing business with Indians living on South Dakota reservations factored the increased cost resulting from the inability to use self-help repossession on Indian reservations into the interest rate charged on loans to reservation Indians, they were subject to complaints of racial discrimination and investigations commenced by the U.S. Department of Justice. *See, e.g., United States v. First Nat'l Bank*, No. 96-5035, Consent Decree (D.S.D. May 7, 1997). *See* App. 1 (attached to this brief). This sort of "Catch 22" only adds to the uncertainty and the reluctance of off-reservation businesses to trade with Indians living on reservations.

one were to remove the Indian reservations from the state-wide average, then the difference would be even more pronounced.

SDBA respectfully submits that greater certainty concerning the limits of tribal court jurisdiction will help fuel the economic engine, both on-reservation and off. Expanding the *Montana* exceptions to grant tribal courts civil adjudicatory jurisdiction over non-members will lead to greater uncertainty and thus limit the amount of fuel available to drive that engine. Limiting the *Montana* exceptions to prohibit the exercise of tribal court adjudicatory jurisdiction over non-members will promote greater certainty and the "sound policy" of greater economic development both on reservations and in the surrounding communities. Accordingly, SDBA respectfully requests that the Court take these important considerations into account when rendering its decision.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeals should be reversed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

v.

FIRST NATIONAL BANK
OF GORDON, NEBRASKA,

Defendant.

CONSENT ORDER

The United States filed this case against the First National Bank of Gordon, Nebraska (hereinafter "the Bank") on April 15, 1996, alleging violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619.

The Complaint alleges that the Bank has engaged in a pattern or practice of discrimination against American Indians in the extension of general consumer loans which are used for personal purposes, as well as for the purchase of automobiles, mobile homes and for home improvements. More specifically, the Complaint alleges that since at least September, 1992 through at least March, 1994, the Bank discriminated illegally against its American Indian customers living in the

state of South Dakota by charging them higher interest rates for the consumer loans than it did for similarly situated non-Indian customers. It is further alleged that this disparity could not have occurred by chance and cannot be fully explained by factors unrelated to race, color, or national origin, such as differences in the borrowers' creditworthiness or by differences in the size and duration of the loans.

The Bank denies the allegations of the Complaint contending that higher interest rates charged some of its American Indian customers living upon the Pine Ridge Indian Reservation were justified by credit risk considerations and that it has complied with all federal lending laws and regulations.

The parties agree that the controversy should be resolved without further proceedings and without an evidentiary hearing. Therefore, the parties have consented to the entry of this Consent Order as indicated by the signatures appearing below.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

I. GENERAL INJUNCTIVE PROVISION

The Bank, its officials, employees, agents, and all other persons in active concert or participation with the Bank are permanently enjoined from imposing higher interest rates or different methods of determining and calculating interest and the interest rate for personal loans, loans for the purchase of

automobiles and mobile homes, and home improvement loans (hereinafter "consumer loans"), on the basis of race, color or national origin.

II. PROVIDING EMPLOYEES WITH COPY OF CONSENT ORDER

Within thirty (30) days after execution of this Consent Order, and throughout the term of this Consent Order, every employee of the Bank who regularly participates in decisions of whether or not to extend consumer loans and/or participates in decisions regarding the terms of such credit, and every officer and director of the Bank shall be provided with a copy of this Consent Order.

III. COMPENSATORY RELIEF

1. The Bank shall create a Fund which will total One Hundred Seventy Five Thousand Dollars ($175,000.00) for distribution to persons that the United States determines have been aggrieved by the discrimination alleged in its Complaint. The Bank will create the Fund on or before July 1, 1997, by making a deposit of One Hundred Thousand Dollars ($100,000.00) into a trust account entitled "First National Bank of Gordon, Nebraska Compensation Fund Trust Account." On or before February 15, 1998, the Bank will make a second deposit of Seventy Five Thousand Dollars ($75,000.00) into the Fund. The Bank will provide written verification of the amount deposited to Department of Justice within seven (7) days of

each deposit into the Fund. Any interest that may accrue on money deposited into the Fund shall become part of the Fund, and the Bank shall have no claim on such interest. Money from the Fund will be distributed by the Bank pursuant to the procedures set forth below.

2. The United States shall compile a list of those American Indian borrowers whom it determines are persons aggrieved by the alleged discrimination (the "United States' list"). The list will include the amount of money from the first deposit into the Fund which is to be paid each person on the list as partial compensation, as well as an approximate amount of money from the second deposit into the Fund which will be paid to each person on the list to provide final and complete compensation. The United States shall be solely responsible for making those determinations. The list will be provided to the Bank upon its completion.

3. The United States shall send a letter to each person on the United States' list, conforming to that set forth in Attachment A, certified mail, return receipt requested ("Notification Letter"). The notification letters shall be accompanied by a copy of a release conforming to Attachment B.

4. No later than July 1, 1997, the Bank shall provide the United States the names and addresses of persons who have returned executed releases, along with copies of such releases. Within twenty business days after July 1, 1997, the Bank shall issue checks

in the amounts designated by the United States, drawn against the Fund and payable to each person for whom it has received an executed release. If the Bank receives any executed release after July 1, 1997 it shall similarly notify the United States and issue a check to such person within five days of receipt of the release. All checks (including checks specified in paragraph III 8) shall be mailed, by certified mail, return receipt requested. The Bank shall provide copies of the canceled checks to the United States in a timely manner as they are returned to Bank.

5. The United States shall provide to the Bank a list of all persons for whom no return receipt card has been obtained. Both the United States and the Bank shall take reasonable steps thereafter to locate such persons and provide them with the notification letter and release. The United States may also take steps to contact any persons who received the letter, but did not return a release to the Bank.

6. After the United States receives verification of the second deposit into the Fund on February 15, 1998, as provided in paragraph III 1, counsel for the United States shall mail to the Bank a second list containing: (1) the names of persons from the United States' first list and the amounts to which each such person is entitled from the money then in the Fund; and (2) the names of additional American Indian borrowers not contained in the United States' first list, whom the United States has determined are also entitled to compensation, and the amounts to which

each such person is entitled from the money then in the Fund.

7. Within twenty (20) days after the Bank receives the information specified in the preceding paragraph, the Bank shall issue checks, drawn against the Fund, to persons on the United States' second list who previously had been contacted and who had returned releases, in the amount specified by the United States.

8. The United States shall mail to all persons identified on the United States' second list not previously contacted, the notification specified in paragraph III 3, in the manner specified therein. The United States shall provide the Bank the names and addresses of persons for whom no return receipt card has been obtained. The parties shall take the steps specified in paragraph III 3 to locate such persons, and the United States may also take steps to locate any persons who received the letter but have not returned a release.

9. Payments from the Fund to persons identified by the United States shall be subject to the following conditions:

(a) No person from the United States' first or second list shall be paid any amount from the Fund until after execution of a written release consistent with that set forth in Attachment A of all claims, legal or equitable, which he or she might have against the Bank, its current, former, and future officers, directors, employees, agents, parent companies, affiliates, and other successors in-interest regarding claims

asserted by the United States in this lawsuit, with respect to the interest rates charged on consumer loans, so long as such claims accrued prior to the entry of this Consent Order.

(b) The total amount to be paid by the Bank to the persons identified by the United States shall not exceed One Hundred Seventy Five Thousand Dollars ($175,000.00) plus the interest that has accrued in the Fund.

10. In the event there is money remaining in the Fund one hundred forty-five (145) days after receipt by the Bank of the United States' second list because persons identified by the United States could not be located or, when located and properly notified, did not return releases, such money will be added to the money used by the Bank to defray fees for documentation and credit reports on consumer loans obtained by residents of the Pine Ridge Reservation from the Bank, as described below in paragraph IV.

IV. COMPENSATION FOR THE COST OF DOCUMENTATION FEES

1. The Bank shall set aside One Hundred Thousand Dollars ($100,000), on the schedule provided herein, to be used by the Bank to pay fees or charges for documentation and credit bureau reports for consumer loans applied for by residents of the Pine Ridge Reservation. The Bank shall set aside Twenty-Five Thousand Dollars ($25,000.00) a year for four years. The first $25,000 set aside for this purpose shall be

made available seven days after the entry of this Consent Order, and thereafter an additional $25,000 shall be made available annually on the anniversary of the entry of the Consent Order in 1998, 1999, and 2000.

2. For each person who is a resident of the Pine Ridge Reservation and applies for a consumer loan from the Bank, the Bank shall defray its fees for documentation and credit bureau report (the full charge is $20.00) for no more than two consumer loans per year. However, the parties may, by mutual agreement, increase or decrease the number of loans for which the Bank will defray such fees to more or less than two per year.

3. Any amount set aside to defray these fees which is not fully used by the Bank in a single year shall be rolled over for use during the following year. The Bank shall not be required to defray fees totaling more than $25,000 a year (plus any money rolled over from the previous year, and plus any residue from the Fund as provided in paragraph III 10).

V. MONEY MANAGEMENT EDUCATION PROGRAM

1. Within ninety (90) days after the entry of this Consent Order, the Bank shall send by first class mail, to counsel for the United States and to the Magistrate Judge: (a) a proposed, personal, money management program designed to educate persons residing on the Pine Ridge Reservation how to establish and

manage credit with the Bank; (b) a list of proposed locations on the Reservation where the program will be presented, and the time of such presentation; and (c) a plan for publicizing the program. Such program shall be designed to provide, at a minimum, the following information:

- What individual borrowers can do to place themselves in good standing to receive credit from the Bank;
- The qualification or criteria considered by loan officers of the Bank in determining a prospective borrower's credit-worthiness;
- How to prepare a loan application;
- The current terms of the loan products offered by the Bank;
- How to establish a saving, checking, or certificate of deposit account with the Bank;
- The current terms of the savings products offered by the Bank;
- How to maintain a checkbook, read a checking or saving statement and reconcile the customer's balance with the Bank's statement.

2. If, within thirty (30) days after receipt of the proposed, education program described above, counsel for the United States indicates in writing to Bank that it does not agree with the proposed program, then counsel for the United States and the Bank shall seek in good faith to resolve their differences within thirty (30) days. In the event that the parties cannot

agree, any dispute regarding the proposed program will be submitted to the Magistrate Judge within fifteen (15) days to rule on same. If, within thirty (30) days after receipt of the proposed program, counsel for the United States has no objection, counsel shall so inform the Bank in writing.

3. After approval of the program, the Bank shall spend at a minimum of fifty (50) hours per year, for four years, presenting the program to residents of the Pine Ridge Reservation, which shall include time spent by Bank officials on travel and in preparation for teaching.

4. During the term of this Consent Order, if the Bank wishes to substantively modify or alter the program, it may do so but shall inform counsel for the United States of the changes in writing prior to instituting the changes.

VI. RECRUITMENT

The Bank will take affirmative steps to increase the pool of qualified American Indian applicants for positions at the Bank, particularly for positions as loan officers.

Among other actions, the Bank may actively solicit qualified American Indian persons for employment by publishing an advertisement in newspapers of general circulation on the Pine Ridge Reservation. Recruitment efforts may also include informing officials on the Pine Ridge Reservation (e.g. representatives of

the tribal government and the Superintendent of the Bureau of Indian Affairs) and institutions of higher education with significant American Indian enrollment (e.g. the Oglala Lakota College, the University of South Dakota at Vermillion, Black Hills State University at Spearfish and the University of North Dakota at Bismarck) of job vacancies; the posting of notices of job vacancies for job vacancies at public institutions on the Reservation; placing radio ads about job vacancies on radio stations which broadcast on the Reservation; and contacting previous American Indian job applicants to inform them of any subsequent new job openings.

VII. RECORD KEEPING AND REPORTING REQUIREMENTS

Unless otherwise provided, this Consent Order shall remain in effect for four (4) years from the date of the entry of this Consent Order.

1. During the period of this Consent Order, the Bank shall retain all applications for consumer loans and all documents and notices relevant to any decisions regarding such loans, including any documents relating to the terms of any such loans. The Bank will retain all records relating to its compliance with this Consent Order.

2. All applications for consumer loans shall request that each applicant provide his or her race or national origin (American Indian or Alaskan Native, Asian or

Pacific Islander, Black, Hispanic, White, Other). The Bank may specify the following on the application:

Information concerning race or national origin is requested by the federal government to monitor compliance with the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, and the Fair Housing Act, 42 U.S.C. §§ 3601-3619. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender may not discriminate on the basis of this information, or on whether you choose to furnish it. However, if you choose not to furnish the information and you have made this application in person, the lender is required to note race or national origin on the basis of visual observation or surname.

If the applicant chooses not to provide this information for an application taken in person, the Bank shall note this fact on the application and note the race or national origin of the applicant(s), to the extent possible, on the basis of visual observation or surname. (The Bank shall not use "Other" when completing the application on the basis of visual observation.)

If an application is taken entirely by telephone, The Bank need not request this information. If an application is taken entirely by mail, and the applicant fails to answer these questions on the application form, the Bank is not required to provide the data. The Bank shall indicate on the face of the application when it was received by telephone or by mail.

3. The Bank shall keep all employee applications for the duration of the Consent Order. The Bank will keep a record of all job vacancies and its efforts to fill the same, listing all applicants for the position, all advertising, all contacts with persons who might want to work for the Bank and other relevant records concerning the job.

4. Upon reasonable notice to counsel for the Bank, representatives of the United States shall be permitted to inspect and copy all pertinent records of the Bank at any and all reasonable times; provided, however, that the United States shall endeavor to minimize any inconvenience to the Bank from inspection of such records.

5. Beginning six months from the entry of this Consent Order and every six months thereafter for the term of this Consent Order, the Bank shall serve by first class mail, postage prepaid, upon counsel for the United States, a six-month report. Such report shall include the following:

(a) any and all changes to the Bank's Consumer Loan Pricing Guidelines and/or Loan Policy concerning consumer loans;

(b) a list of all approved consumer loans including the name(s), address, telephone number, and race or national origin (pursuant to paragraph VII 2), including the loan number, initial principal amount, interest rate, maturity date, whether the loan was secured or unsecured, and whether the loan was single pay or installment; and a list of all denied consumer

loans including name(s), address, telephone number, and race or national origin (pursuant to paragraph VII 2).

(c) the name and address of each consumer loan applicant for whom the loan fees (paragraph IV) were waived during the reporting period, the number of defrayed loans to each loan applicant, and the balance of the money set aside pursuant to paragraph IV remaining for waiver of loan documentation fees at the end of the six month reporting period;

(d) the date, location, content and duration of any community education program conducted during the reporting period (paragraph V); and

(e) the job openings which became available during the reporting period; the name and address of each person applying for each such job opening; the name of the person chosen to fill each job opening; and a description of the efforts made by the Bank pursuant to paragraph VI to recruit American Indian applicants for each opening.

VIII. MODIFICATION OF CONSENT ORDER

The parties may alter the terms of this Consent Order by signed, written, mutual agreement, including but not limited to an extension of any time limits for performance.

IX. DISMISSAL

This action is dismissed without prejudice to the right of either party to approach the Court regarding matters of noncompliance with the terms of this Consent Order. The parties to this Order will endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Order prior to bringing such matters to the Court for resolution.

X. COSTS

Each party to this litigation will bear its own costs.

It is so ORDERED this day of, 1997

UNITED STATES DISTRICT JUDGE

It is so agreed by the parties.

For the United States:

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Pierre, SD 57501-0160
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ATTACHMENT A

Notification Letter

United States Department of Justice

Dear :

As you may know, in April, 1996 the United States government brought a lawsuit in the federal court located in South Dakota alleging that certain policies and practices of the First National Bank of Gordon, Nebraska, in effect from at least September of 1992 through March of 1994, discriminated against American Indian customers of the Bank by charging them higher interest rates for consumer loans than similarly situated white customers. The Bank has denied these allegations and asserted that it has never illegally discriminated in extending consumer loans.

More recently, the government and the Bank agreed to voluntarily settle this case, and on, 1997, the federal court entered a Consent Order submitted to it which sets forth that settlement. You may obtain a copy of this Consent Order either from the attorneys for the United States who are listed later in this letter or from the Bank.

You will note that Part III of the Consent Order requires the establishment of a Fund by the Bank designed to compensate persons whom the government determines have been victims of the discrimination alleged in the case. This is to inform you that the government has completed its review of this matter and has identified you as a person entitled to compensation from this Fund, in the amount of approximately ___. The first installment of this compensation in the amount of ___ is available after July 1, 1997 upon the completion of the requirements set out below. A second installment of approximately ___ will be mailed to you early in 1998, although the precise amount of this second payment will be determined at that time.

In order to receive the payments designated above, you must sign the General Release which is attached to this letter. By signing this Release you agree that in accepting these payments, you agree not to sue the First National Bank of Gordon, Nebraska for any discrimination by the Bank of the kind charged by the government that may have occurred prior to this date. If you decide to sign this Release, you should sign on the two lines designated on it for your signature. You should then return it in the enclosed preaddressed envelope:

[address provided by the Bank]

The Fund will be established on July 1, 1997. Shortly after that date, the Bank will mail a certified check to you by certified mail, in the amount specified in this

letter if you have signed and returned the enclosed Release. Checks for any Release received after July 1, 1997, will be mailed upon receipt of the Release. In addition, a second check will be mailed to you after February 15, 1998. No further action will be necessary on your part to receive the second check, if you have signed and returned the Release.

The government believes the money designated above for you to receive is a fair settlement of any claim that you may have as a result of the discrimination alleged in the lawsuit. Attorneys for the government are willing to discuss this matter with you to answer any questions you may have and discuss what options are available to you. If you wish to discuss this matter with a government attorney you should call 1-800-xxx-xxxx and leave your name, address and telephone number. A government attorney will then contact you. You may also write to:

Thomas J. Keary
Marta Campos
United States Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
P.O. Box 65998
Washington, D.C. 20035-5998

You should be aware that government attorneys cannot act as your private attorney, however. Therefore, you may also want to consult with a private attorney to discuss this matter and the options available to you, or to have an attorney of your choice contact the government.

If you do not want to participate in this settlement, you may decline to do so. By declining to participate, you will give up your right to receive the money discussed in this letter, but will not waive any other rights or claims that you believe you are entitled to.

We look forward to hearing from you.

Sincerely,

ATTACHMENT B

GENERAL RELEASE

STATE OF SOUTH DAKOTA

COUNTY OF

WHEREAS, I, [Releaser name] understand that the United States of America ("United States") filed a civil action in the United States District Court of South Dakota against the First National Bank of Gordon, Nebraska ("the Bank") alleging violations of the Equal Credit Opportunity Act, and the Fair Housing Act, as amended, by discriminating against American Indians in the provision of consumer loans;

WHEREAS, I further understand that the Bank denied the allegations in all respects;

WHEREAS, I further understand that the United States and the Bank have agreed to a settlement of the above case and that the United States District Court has approved and entered a Consent Order which includes a provision for the establishment of a

fund from which money is to be paid by the Bank to persons whom the United States identifies as aggrieved by the discrimination alleged; and

WHEREAS, I further understand that the United States has identified me as one of the persons it has determined has been aggrieved by the discrimination alleged,

THEREFORE, I agree to the following:

In consideration of dollars to be paid to me, I, [Releaser name], hereby agree, effective upon receipt of payment, to release the Bank and its current, former, and future officers, directors, employees, agents, parent companies, affiliates, and successors-in-interest from all legal and equitable claims or causes of action that have or might have been asserted by me or the United States as of the date of execution of this General Release that arise out of any alleged discrimination on the basis of national origin with respect to the interest rate on any consumer loan(s) I received from the Bank.

I acknowledge and understand that, by signing this Release and accepting this payment, I am waiving any right to pursue my own legal action based on the discrimination alleged by the United States in this case.

I also acknowledge that I have been informed that I may review the terms of this Release with an attorney of my choosing, and to the extent that I have not

obtained that legal advice, I voluntarily and knowingly waive my right to do so.

I waive any claims I may have against the United States arising out of this action.

This General Release constitutes the entire agreement between First National Bank of Gordon, Nebraska, the United States, and me, without exception or exclusion.

Signed this ___ day of ___, 1997

[Releaser's name]

DECLARATION

I state under penalty of perjury that the forgoing is true and correct.

Signed this ___ day of ___, 1997

1.

For purposes of this Order, counsel for the United States is Chief, Housing and Civil Enforcement Section, Civil Rights Division, United States Department of Justice, Post Office Box 65998, Washington, D.C. 20035-5998.

JOINT APPENDIX

Supreme Court, U.S.
FILED
AUG 31 2015
OFFICE OF THE CLERK

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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Petition Filed June 12, 2014
Certiorari Granted June 15, 2015

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Appendix A

Relevant District Court Docket Entries

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
(EASTERN)

Civil Docket For Case #: 4:08-cv-00022-TSL-LRA

DOLGENCORP, INC. et al.

v.

THE MISSISSIPPI BAND OF CHOCTAW

DOCKET ENTRIES

DATE	#	DOCKET TEXT
03/10/2008	1	COMPLAINT against all defendants (Filing fee $ 350 receipt number J024193), filed by Dolgencorp, Inc., Dollar General Corporation, Dale Townsend. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Civil Cover Sheet)(RRL) (Entered: 03/10/2008)
03/10/2008	2	MOTION for Temporary Restraining Order and Preliminary Injunction by Dolgencorp, Inc., Dollar General Corporation, Dale Townsend. (RRL) (Entered: 03/10/2008)

* * * *

DATE	#	DOCKET TEXT
03/19/2008	6	MOTION for Temporary Restraining Order, MOTION for Preliminary Injunction by Dale Townsend (Gault, William) (Entered: 03/19/2008)
		* * * *
04/14/2008	8	ANSWER to 1 Complaint by The Mississippi Band of Choctaw Indians, The Tribal Court of the Mississippi Band of Choctaw Indians, Christopher A. Collins. (Attachments: # 1 Exhibit A to the Answer to Complaint, # 2 Exhibit B to the Answer to Complaint, # 3 Exhibit C to the Answer to Complaint, # 4 Exhibit D to the Answer to Complaint)(Rogers, Carl) (Entered: 04/14/2008)
		* * * *
04/14/2008	12	ANSWER to 1 Complaint by John Doe.(Dover, Brian) (Entered: 04/14/2008)
		* * * *
04/14/2008	16	ANSWER to 1 Complaint by John Doe.(Dover, Brian) (Entered: 04/14/2008)
		* * * *
12/19/2008	36	Memorandum Opinion and Order re 2 MOTION for Temporary Temporary Restraining Order of Dollar General and Dolgen Corp is denied; 6 MOTION for Temporary Restraining

DATE	#	DOCKET TEXT
		Order/MOTION for Preliminary Injunction of Dale Townsend is granted. Signed by District Judge Tom S. Lee on 12/19/08 (LWE) (Entered: 12/19/2008)
		* * * *
04/08/2011	55	MOTION for Summary Judgment by Dolgencorp, Inc., Dollar General Corporation (Attachments: # 1 Exhibit Exhibit A Louise Wilson Deposition Excerpts, # 2 Exhibit Exhibit B Poli y Against Minors Working in Store)(Harold, Edward) (Entered: 04/08/2011)
		* * * *
05/05/2011	57	RESPONSE in Opposition re 55 MOTION for Summary Judgment filed by Christopher A. Collins, The Mississippi Band of Choctaw Indians, The Tribal Court of the Mississippi Band of Choctaw Indians (Rogers, Carl) (Entered: 05/05/2011)
		* * * *
05/05/2011	58	Cross MOTION for Summary Judgment by Christopher A. Collins, The Mississippi Band of Choctaw Indians, The Tribal Court of the Mississippi Band of Choctaw Indians (Rogers, Carl) (Entered: 05/05/2011)
		* * * *

DATE	#	DOCKET TEXT
05/06/2011	61	RESPONSE in Opposition re 55 MOTION for Summary Judgment filed by John Doe (Dover, Brian) (Entered: 05/06/2011)
05/06/2011	62	MOTION for Summary Judgment by John Doe (Dover, Brian) (Entered: 05/06/2011)
		* * * *
12/21/2011	68	MEMORANDUM OPINION AND ORDER denying 55 Motion for Summary Judgment; granting 58 Motion for Summary Judgment; granting 62 Motion for Summary Judgment Signed by District Judge Tom S. Lee on December 21, 2011 (DCL) (Entered: 12/21/2011)
02/16/2012	69	FINAL JUDGMENT dismissing case with prejudice. Signed by District Judge Tom S. Lee on 2/16/12.(TLC) (Entered: 02/16/2012)
03/05/2012	70	NOTICE OF APPEAL as to 68 Order on Motion for Summary Judgment,, by Dolgencorp, Inc., Dollar General Corporation. Filing fee $ 455, receipt number 05382081125. Appeal Record due by 3/20/2012 (Harold, Edward) (Entered: 03/05/2012)
		* * * *
07/27/2012	74	Joint MOTION Federal Rule of Civil Procedure 60 to correct the judgment rendered in this case. re 69

DATE	#	DOCKET TEXT
		Judgment by Christopher A. Collins, John Doe, Dolgencorp, Inc., Dollar General Corporation, The Mississippi Band of Choctaw Indians, The Tribal Court of the Mississippi Band of Choctaw Indians, Dale Townsend (Attachments: # 1 Exhibit A-Order from 5 Circuit Granting Motion to Remand, # 2 Exhibit B-Proposed Judgment)(Harold, Edward) (Entered: 07/27/2012)
07/30/2012	75	ORDER granting 74 Motion to vacate judgment entered 2/16/12 and issue a new judgement in this matter. Signed by District Judge Tom S. Lee on 7/30/12 (LWE) (Entered: 07/30/2012)
07/30/2012	76	JUDGMENT dismissing case. Signed by District Judge Tom S. Lee on 7/30/12. (TLC) (Entered: 07/30/2012)
08/24/2012	77	NOTICE OF APPEAL as to 68 Order on Motion for Summary Judgment,, by Dolgencorp, Inc., Dollar General Corporation. Filing fee $ 455, receipt number 05382223513. (Harold, Edward) (Entered: 08/24/2012)

* * * *

Appendix B

Relevant Court of Appeals Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 12-60668

DOLGENCORP, INC. et al.

v.

MS BAND OF CHOCTAW INDIANS, et al

DOCKET ENTRIES

DATE	DOCKET TEXT
08/31/2012	CIVIL RIGHTS CASE docketed. NOA filed by Appellants Dolgencorp, Inc. and Dollar General Corp [12-60668] (SBS)
	* * * *
11/13/2012	APPELLANT'S BRIEF FILED by Dolgencorp, Incorporated and Dollar General Corp. Date of service: 11/13/2012 via email - Attorney for Appellant: Harold; Attorney for Appellees: Dover, Jordan, Rogers [12- 60668] REVIEWED AND/OR EDITED.. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on

DATE	DOCKET TEXT
	11/19/2012 for Appellants Dolgencorp, Incorporated and Dollar General Corp.. Appellee's Brief due on 12/17/2012 for Appellees Christopher A. Collins, John Doe, Mississippi Band of Choctaw Indians and Tribal Court of the Mississippi Band of Choctaw Indians [12-60668] (Edward Francis Harold)
	* * * *
01/15/2013	APPELLEE'S BRIEF FILED by Appellees Mr. Christopher A. Collins and Mississippi Band of Choctaw Indians. Date of service: 01/15/2013 via US mail - Attorney for Appellant: Harold; Attorney for Appellees: Dover, Jordan; email - Attorney for Appellant: Harold; Attorney for Appellees: Dover, Jordan, Rogers [12- 60668] REVIEWED AND/OR EDITED.
	* * * *
02/15/2013	APPELLANT'S REPLY BRIEF FILED by Dolgencorp, Incorporated and Dollar General Corporation # of Copies Provided: 0
	Reply Brief deadline satisfied. Paper Copies of Brief due on 02/20/2013 for Appellants Dolgencorp, Incorporated and Dollar General Corporation. [12-6068] (DDV)

DATE	DOCKET TEXT
	* * * *
06/04/2013	ORAL ARGUMENT HEARD before Judges Smith, Haynes, Graves. Arguing Person Information Updated for: Edward Francis Harold arguing for Appellant Incorporated Dolgencorp; Arguing Person Information Updated for: Carl Christopher A. Collins, Appellee Mississippi Band of Choctaw Indians [12-0668] (PFT)
10/03/2013	PUBLISHED OPINION FILED. [12-60668 Affirmed] Judge: JES , Judge: CH , Judge: JEG Mandate pull date is 10/24/2013 [12-60668] (JMA)
10/03/2013	JUDGMENT ENTERED AND FILED. [12-60668] (JMA)
	* * * *
10/17/2013	PETITION filed by Appellants Dolgencorp, Incorporated and Dollar General Corporation for rehearing enbanc [7483909-2]. Date of Service: 10/17/2013 via email - Attorney for Appellant: Harold; Attorney for Appelle: Kilgore [12-60668] (Edward Francis Harold)
	* * * *
10/18/2013	COURT DIRECTIVE ISSUED requesting a response from counsel for appellees to the petition for rehearing en banc filed by Appellants

DATE	DOCKET TEXT
	Dollar General Corporation and Dolgencorp, Incorporated in 12- 60668 [7483909-2] Response/ Opposition due on 10/28/2013. [12-60668] (CMB)
	* * * *
10/25/2013	LETTER filed by Appellee Mr. John Doe referencing court order Court directive requesting a response [7484716-2]. Date of Service: 10/25/2013 via email – Attorney for Appellant: Harold; Attorney for Appellees: Dover, Jordan, Rogers; US mail – Attorney for Appellee: Kilgore [12-60668] REVIEWED AND/OR EDITED. (Brian Douglas Dover)
03/05/2014	LETTER filed by Appellees Mr. Christopher A. Collins, Mississippi Band of Choctaw Indians and Tribal Court of the Mississippi Band of Choctaw Indians Date of Service: 03/05/2014 via email - Attorney for Appellant: Harold; Attorney for Appellees: Dover, Jordan, Kilgore, Rogers [12-60668] REVIEWED AND/OR EDITED.
	LETTER filed advising the court that counsel will be unavailable to respond to matters arising from this action during the period of 3/6/14 - 3/22/14. [12-60668] (Carl Bryant Rogers

DATE	DOCKET TEXT
03/14/2014	COURT ORDER denying petition for rehearing en banc filed by Appellants Dollar General Corporation and Dolgencorp, Incorporated [7483909-2] With Poll.; (Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is denied) (IN DETAIL) (JES, Circuit Judge, joined by EHJ, EBC, PRO, and LHS, dissenting from the denial of Rehearing En Banc) [7587012-1]; reopening case [7587012-3] [12-60668] (JMA)
	* * * *
03/14/2014	OPINION WITHDRAWN. [7472724-2] [12-60668] (JMA)
03/14/2014	PUBLISHED OPINION FILED. [12-60668 Affirmed] Judge: JES ,Judge: CH , Judge: JEG Mandate pull date is 04/04/2014 [12-60668] (JMA)
03/14/2014	JUDGMENT ENTERED AND FILED. [12-60668] (JMA)
	* * * *

Appendix C

Complaint filed in Tribal Court

January 6, 2005

IN THE CHOCTAW TRIBAL COURT
MISSISSIPPI BAND OF CHOCTAW INDIANS

[Filed: Jan. 06, 2005]

Number: _____

JOHN DOE, JR., A MINOR, BY AND THROUGH
HIS PARENTS AND NEXT FRIENDS,
JOHN DOE, SR. AND JANE DOE,

Plaintiffs,

VS.

DOLLAR GENERAL CORPORATION AND DALE TOWNSEND,
INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH
DOLLAR GENERAL CORPORATION,

Defendants.

COMPLAINT

COMES NOW said minor, a fourteen (14) year old member of the Mississippi Band of Choctaw Indians, by and through his mother and father as next friends, and institutes this suit against Dollar General and Dale Townsend, individually and jointly and severally with Dollar General Corporation, and in support thereof would state as follows, to-wit:

I.

Your Plaintiff alleges and charges that as a thirteen year old minor on July 14, 2003, that he was employed with the Youth Opportunity Program and was assigned to the Dollar General Store at Choctaw Towne Center on the Pearl River Reservation located within the exterior boundaries of the Choctaw Indian Reservation. Further, this Honorable Court has jurisdiction of the parties and subject matter in that all occurrences giving rise to Plaintiff's cause of action occurred within the confines of the Choctaw Indian Reservation.

That the minor Plaintiff was assigned to Dollar General's store and that Dale Townsend was the immediate supervisor of the minor at Dollar General Store.

Your Plaintiff would allege and charge that the Defendant, Dale Townsend, is an adult, resident citizen of Neshoba County, Mississippi, and he is sued individually, as well as jointly and severally with the Defendant, Dollar General Corporation, a non-resident corporation domiciled at 100 Mission Ridge, Goodlettsville, Tennessee, 37072.

III.

That at all times complained of herein, the Defendant, Dale Townsend, an adult, was the manager in charge of the Dollar General Store at Choctaw Towne Center, and at all times acted as the agent, servant, and alter-ego of the Defendant, Dollar General Corporation, and that all acts complained of were intentional and amounted to gross negligence on the parts of Dale Townsend and Dollar General Corporation, jointly and severally.

IV.

Your Plaintiff would show that on or about July 14, 2003, without cause or provocation, the Defendant, Dale Townsend, acting as agent for the Defendant, Dollar General Corporation, followed the minor into the stockroom and made uninvited sexual advances against said minor. Your minor Plaintiff herein would show that he answered in the negative as to the uninvited assault and indicated that the remark and advance were unwelcome. Plaintiffs would show that prior to this date, Dollar General had notice of, or should have known, of Townsend's propensity to harm children.

V.

Your Plaintiff would further show that on July 15, 2003, that he again reported for duty at the Defendant's store at Choctaw, Mississippi, at which time the Defendant, Dale Townsend, agent for the Defendant, Dollar General Corporation, made several severe and uninvited sexual advances toward the minor throughout the day. Although said minor attempted to distance himself from Townsend, Townsend repeatedly continued to initiate sexual advances toward said minor, Townsend offered money to said minor in an attempt to coerce said minor into agreeing to allow his sexual advances. Said minor again indicated to Townsend that said advances were unwelcome and offensive. At this time the said Dale Townsend, Defendant and agent for Dollar General Corporation, grabbed the minor Plaintiff herein in his crotch area and stopped only when said minor escaped from his grasp. After said assault and battery, the Defendant Townsend, agent for Dollar General Corporation, again made unwelcome and sexually offensive remarks to said minor. Again the minor Plaintiff answered in the negative.

VI.

Defendant, Dollar General Corporation, negligently hired, trained or supervised Defendant Townsend.

VII.

Plaintiff would show that all advances, solicitations, assaults, and battery were uninvited and that as a direct and proximate cause of the above stated negligence and intentional acts of both Defendants, Plaintiff has suffered and sought medical treatment for severe mental trauma, including, but not limited to, depression, mental and physical disability, failing a school grade after having been a model student, panic attacks, and combativeness. Plaintiff would further show that the injuries sustained by him through the Defendant, Dale Townsend's, gross negligence and intentional acts, are hereby imputed, jointly and severally, to the Defendant, Dollar General Corporation.

As a direct and proximate result of both defendant's initial acts and negligence, Plaintiff Demands Judgment for actual and punitive damages in a sum not less than 2.5 million dollars, together with all costs expended herein, and interest from date of judgment.

JOHN DOE, JR., A MINOR, BY AND THROUGH HIS MOTHER AND FATHER, AS ADULT AND NEXT FRIENDS, BY AND THROUGH THEIR ATTORNEYS JORDAN & WHITE

/s/ Terry L. Jordan
TERRY L. JORDAN, ATTORNEY
MS BAR NUMBER 3234
JORDAN AND WHITE, ATTORNEYS
POST OFFICE DRAWER 459
PHILADELPHIA, MS 39350
601-656-2451

AND

/s/
BRIAN D. DOVER, ATTORNEY
MS BAR NUMBER 10538
624 SOUTH MAIN STREET, STE. 208
JONESBORO, AR 72401

Appendix D

Amended Complaint filed in Tribal Court

April 22, 2005

IN THE CHOCTAW TRIBAL COURT
MISSISSIPPI BAND OF CHOCTAW INDIANS

[Filed: April 22, 2005]

Number: CV-02-05

JOHN DOE, JR., A MINOR, BY AND THROUGH
HIS PARENTS AND NEXT FRIENDS,
JOHN DOE, SR. AND JANE DOE,

Plaintiffs,

VS.

DOLLAR GENERAL CORPORATION; DOLGENCORP, INC.;
AND DALE TOWNSEND, INDIVIDUALLY AND JOINTLY AND
SEVERALLY WITH DOLLAR GENERAL CORPORATION
and DOLGENCORP, INC.; and Fictitious Defendants
"A", "B", and "C", whether singular or plural, those
other persons, corporations, firms, or other entities
whose wrongful conduct caused or contributed to
cause the injuries and damages to the Plaintiff,
all of whose true and correct names are unknown
to Plaintiff at this time, but will be substituted
by amendment when ascertained,

Defendants.

AMENDED COMPLAINT

Plaintiffs amend their original Complaint by adding Dolgencorp, Inc., and Fictitious Defendants "A", "B", and "C", as Defendants to this cause.

I.

Defendant Dolgencorp, Inc., is a non-resident corporation which has not appointed an agent for service of process and which is located at 100 Mission Ridge, Goodlettsville, TN 37072.

II.

Fictitious Defendants "A", "B", and "C", whether singular or plural, are those other persons, firms, corporations, or other entitles whose wrongful conduct caused or contributed to cause the injuries and damages to the Plaintiffs, all of whose true and correct names are unknown to Plaintiffs at this time, but will be substituted by amendment when ascertained.

III.

This amendment was made merely to add the above listed Defendants in this cause.

Respectfully submitted on this 21st day April, 2005.

JOHN DOE, JR., A MINOR, BY AND THROUGH HIS MOTHER AND FATHER, AS ADULT AND NEXT FRIENDS

By:/s/ Brian D. Dover

BRIAN D. DOVER
ATTORNEY, PLLC
915 S. Main
JONESBORO, AR 72401
870-934-1511
MS BAR NUMBER 10538

CERTIFICATE OF SERVICE

I Brian D. Dover, attorney for Plaintiffs, do hereby certify that on this 21st day of April, 2005, a true and correct copy of the foregoing pleading was mailed by United States Mail, postage prepaid, to the following:

Honorable Keith Ball
Currie, Johnson, Griffin, Gaines, & Myers, P.A.
P.O. Box 750
Jackson, MS 39232
Attorney for Dollar General, Dolgencorp, Inc.

Honorable Edward F. Harold
Fisher & Phillips, LLP
201 St. Charles Ave., Ste. 3710
New Orleans, LA 70170
Attorney for Dollar General, Dolgencorp, Inc.

Honorable William Gualt, Jr.
Kelly Gualt & Healy, LLP
Highland Bluff Building
P.O. Box 13926
Jackson, MS 39236-3926
Attorney for Dale Townsend

/s/ Brian D. Dover
BRIAN D. DOVER

Appendix E

Complaint filed in Federal Court

March 10, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

[Filed: March 10, 2008]

Civil Action No. 4:08-cv-22-TSL-JCS

DOLGENCORP INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND,

Plaintiffs,

versus

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (in his official capacity), and JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Defendants.

JUDGE

MAGISTRATE

COMPLAINT

Dollar General Corporation, Dolgencorp Inc. and Dale Townsend allege as follows:

1.

Plaintiff Dolgencorp Inc. (hereinafter "Dollar General") is a Kentucky corporation with its principle place of business at 100 Mission Ridge, Goodlettsville, Tennessee.

2.

Plaintiff Dollar General Corporation is a Tennessee corporation with its principle place of business in Goodlettsville, Tennessee.

3.

Plaintiff Dale Townsend is a person of the full age of majority and a resident of Neshoba County, Mississippi.

4.

Defendant, the Mississippi Band of Choctaw Indians (hereinafter "the Tribe") is a federally recognized Indian Tribe whose reservation is located within the geographic boundaries of the United States District Court for the Southern District of Mississippi.

5.

Defendant, the Tribal Court of the Mississippi Band of Choctaw Indians is the judicial arm of the Tribe created by the Tribal Council pursuant to the Constitution of the Tribe as reflected in the Tribal Code.

6.

Defendant the Honorable Christopher A. Collins, is an individual of the full age of majority and a resident of Neshoba County, Mississippi, named here in his

official capacity as trial court judge for Tribal Court of the Mississippi Band of Choctaw Indians. John Doe's action in Tribal Court has been assigned to Judge Collins' division.

7.

Defendant, John Doe, by and through his parents and next friends, John Doe Sr. and Jane Doe, on information and belief is a minor child and a member of the Mississippi Band of Choctaw Indians. Defendant Doe is the Plaintiff in that certain suit styled "John Doe, by and through his parents and best friends, John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.," Civil Action No. CV-2-05 on the docket of the trial court of the Tribal Court of the Mississippi Band of Choctaw Indians.

8.

This court has jurisdiction over this action under 28 U.S.C. 1331 as an action arising under the laws of the United States.

9.

Venue is proper in this court as all defendants reside and/or may be found in the geographical boundaries of the United States District Court for the Southern District of Mississippi and the activities giving rise to this Complaint have occurred and are occurring in this judicial district.

10.

Dollar General Corporation, Dolgencorp, Inc. and Dale Townsend (hereinafter sometimes "Plaintiffs") have been named as defendants in a civil suit filed in Tribal Court by John Doe, (an unidentified minor), through his parents.

11.

Plaintiffs responded to the suit with motions to dismiss for lack of subject matter and/or personal jurisdiction.

12.

On July 28, 2005, Defendant Collins denied Plaintiffs' Motions to Dismiss and concluded that the Tribal Court had jurisdiction over Plaintiffs.

13.

On August 13, 2005, Dollar General Corporation and Dolgencorp, Inc. filed a Motion with the Supreme Court of the Mississippi Band of Choctaw Indians (the "Choctaw Supreme Court") requesting permission to appeal the decision of the Tribal Trial Court on the jurisdictional issue. Dale Townsend joined in this motion.

14.

On February 8, 2008, the Choctaw Supreme Court granted the Motion for Permission to Appeal. The Choctaw Supreme Court then concluded that the Tribal Court had jurisdiction over Plaintiffs. On March 3, 2008, the Choctaw Supreme Court ordered that John Doe's suit go forward in Tribal Court.

15.

Plaintiffs have no avenue available to them to further contest the jurisdiction of the Tribal Court in Tribal Court and have fully exhausted all avenues available to it in Tribal Court for contesting jurisdiction.

16.

The decision of the Choctaw Supreme Court is erroneous. The Tribal Court does not have jurisdiction

over Plaintiffs in the action filed on behalf of John Doe by his parents.

17.

Plaintiffs will suffer irreparable harm if it is required to continue litigation of John Doe's case in Tribal Court. Particularly, continued litigation in Tribal Court could subject them to a judgment and the enforcement thereof by Tribal authorities with no avenue for redress against the Tribe due to the Sovereign Immunity of the Tribe. Additionally, Plaintiffs would have to expend significant sums to defend themselves in a court without jurisdiction with no avenue for ever recovering those expenditures.

18.

Plaintiffs will suffer further irreparable injury in Tribal Court as the limited jurisdiction of that court may well impair its ability to subpoena witnesses necessary to the defense of the claim.

19.

John Doe will not be substantially harmed by the issuance of an injunction against proceeding in Tribal Court as the only proceedings in Tribal Court to date have dealt with that court's jurisdiction and John Doe may file his claims for damages in state court or federal court.

20.

The public interest will be served by the granting of the injunction. Particularly, the public has an interest in the proper delineation of the scope of Tribal Courts' jurisdiction.

21.

John Doe seeks the recovery of punitive damages in his Tribal Court action.

22.

The Tribal Court does not have jurisdiction to award civil penalties including punitive damages against Plaintiffs.

23.

In 2003, Defendant Mississippi Band of Choctaw Indians brought an action in Tribal Court against Dale Townsend seeking to exclude him from the boundaries of the reservation forever.

24.

In that proceeding, the Office of the Attorney General of the Mississippi Band of Choctaw Indians represented to Mr. Townsend that should he agree to an order of exclusion, there would be no further legal proceedings against him.

25.

Based on these representations, Mr. Townsend consented to the Order of Exclusion being entered against him.

26.

In so doing, Mr. Townsend waived his rights to a hearing, to confront his accuser, and to the assistance of counsel.

27.

As a result of agreeing to the Order of Exclusion, Mr. Townsend lost his job because he could not come to work at the Dollar General store on the reservation.

28.

On March 3, 3008, the Choctaw Supreme Court purportedly modified the Order of Exclusion for the sole

purpose of allowing Mr. Townsend to come back on the reservation for the defense of John Doe's action.

29.

The Order of Exclusion was issued in action No. CV-1318-2003 titled Mississippi Band of Choctaw Indians v. Dale Townsend.

30.

The Supreme Court's order purportedly modifying the Order of Exclusion was issued in the action No. CV-02-05 titled John Doe, Jr., A Minor, by and through his parents and next friends, John Doe, Sr. and Jane Doe v. Dollar General Corporation, Dolgencorp, Inc. and Dale Townsend individually and jointly and severally with Dollar General Corporation and Dolgencorp, Inc.

31.

Being required to participate in proceedings in Tribal Court would violate Plaintiffs' rights to Due Process as guaranteed by the United States Constitution.

32.

Attached hereto as Exhibit 1 is a complete and true copy of the record of proceedings in Tribal Court.

WHEREFORE, Plaintiffs pray that after due proceedings be had, the Court provide them the following relief;

1) For a temporary restraining order prohibiting Defendants from taking any action or any step in the prosecution of that certain case "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05 currently pending in the Tribal Court for the Mississippi Band of Choctaw Indians including, but not limited to, engaging in discovery, seeking any

relief, filing any motions, issuing any orders, making any findings of fact or conclusions of law;

2) to schedule within 10 days of the date of the Temporary Restraining Order a hearing on Plaintiff's request for Preliminary Injunctive Relief, and that the a preliminary injunction issue prohibiting Defendants from taking any action or any step in the prosecution of that certain case "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05 currently pending in the Tribal Court for the Mississippi Band of Choctaw Indians including, but not limited to, engaging in discovery, seeking any relief, filing any motions, issuing any orders, making any findings of fact or conclusions of law;

3) That at the time of trial, the preliminary injunction be made permanent, enjoining Defendants forevermore from taking any action or any step in the prosecution of that certain case "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05 currently pending in the Tribal Court for the Mississippi Band of Choctaw Indians including, but not limited to, engaging in discovery, seeking any relief, filling any motions, issuing any orders, making any findings of fact or conclusions of law;

4) For such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Edward Harold
EDWARD F. HAROLD
Mississippi Federal Bar Roll No. 30207
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COUNSEL FOR PLAINTIFF, DOLGENCORP INC.

/s/ William Gault Jr.
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LAW OFFICES OF WILLIAM I. GAULT, JR., PLLC
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Jackson, Mississippi 39236
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Facsimile: 601-510-8050
COUNSEL FOR DEFENDANT, DALE TOWNSEND

Appendix F

Lease for Dollar General Store

November 7, 2000

SC-J

12/99

LEASE

PARTIES. THIS LEASE, made and entered into this 7th day of November 2000, by and between Choctaw Shopping Center Enterprise, (hereinafter called "Lessor"), and Dolgencorp, Inc., (hereinafter called "Lessee").

WITNESETH

I. PREMISES. Lessor represents and warrants that it owns lawful leasehold title to the Shopping Center Premises in which the demised premises are located and which are more particularly described on the legal description attached hereto and made a part hereof as Exhibit "A". Lessor hereby leases unto Lessee on the following terms and conditions a storeroom which is 7,891 square feet, outside dimensions (the "Demised Premises"), located in and a part of Choctaw Town Center Shopping Center, which entire Shopping Center is shown on the plot plan attached hereto as Exhibit "B" and made a part hereof, with the demised premises being cross-hatched thereon together with each and every appurtenance thereto, which Shopping Center is located at 102 Choctaw Town Center, on the Mississippi Choctaw Indian Reservation, Philadelphia, County of Neshoba, and state of Mississippi 39350.

II. TERM. The term of this Lease shall be from November 1, 2000 through October 31, 2005 unless sooner terminated as provided or permitted herein.

Provided it shall not be in default hereunder, Lessee shall be entitled to extend the term of this Lease for one (1) successive period of five (5) years upon the same terms and conditions as herein set forth, except as to term, number of renewals, and rent. Lessee may extend this Lease by giving Lessor written notice as provided herein not less than ninety (90) days prior to the expiration of the original term, or of any renewal thereof. In the event Lessee does not give notice of exercising its tight to renew this Lease, all succeeding renewals shall terminate. Lessee may use the demised premises for the retail sale of general merchandise of the type sold in other Dollar General® Stores and for no other purposes without the express written consent of Lessor which shall not be unreasonably withheld.

III. RENT. During the primary term, the rental shall be two thousand, three hundred one and 54/100 ($2,301.54) dollars (3.50 per sq. ft.) per calendar month payable in advance on or before the first day of each month, without offset or demand, except as otherwise provided herein.

During the option period, the rental shall be two thousand, nine hundred fifty nine, and 13/100 ($2,959.13) dollars (4.50 per sq. ft.) per calendar month payable in advance on or before the first day of each month, without offset or demand, except as otherwise provided herein.

The effective and binding date of this Lease shall be the date of execution, but that payment of the rent provided in this Lease shall commence on the date on which LesseeÁs store in the demised premises is occupied by Lessee.

Security Deposit. Lessee agrees to accept, as a security deposit for the Demised Premised, the security deposit

paid under Lease dated May 3, 1989 between Choctaw Shopping Center Enterprise and Dolgencorp, Inc.

LESSOR REPRESENTS AND WARRANTS THAT IT SHALL COMPLETE ALL OF ITS WORK AND RENOVATION OF THE DEMISED PREMISES AS DESCRIBED IN EXHIBIT "C" BY THE CLOSE OF BUSINESS ON November 7, 2000.

IV. EXCLUSIVE USE COVENANT. Lessor covenants and agrees not to lease, rent, occupy, or allow to be occupied, any part of the Shopping Center premises for the purpose of conducting business as or for use as a Family Dollar Store, Bill's Dollar Store, Fred's, or Super Ten so long as Lessee is not in material breach of this Lease and Lessee's store remains open for business.

Should Lessee, or a subtenant or assignee of Lessee, intentionally cease to conduct business in the demised premises, then this covenant shall terminate upon the data of cessation of the business. This covenant shall run with the Lease.

Lessor acknowledges that in the event of any breech of this Exclusive Use Covenant hereof, Lessee shall be entitled to cancel this Lease.

V. COMMON AREA. The entire tract of land on which Lessor has constructed the Shopping Center is shown on the plot plan attached to and made a part hereof. Such plot plan designates the location and size of all buildings constructed, store sizes, parking area, which shall be sufficient for adequate parking of customer cars, customer parcel pickup facilities, and Lessee's delivery service areas. All that portion of the tract of land not covered by buildings is to be common area for the joint use of all tenants, customers, invitees, and employees. Lessor agrees that it will not erect a kiosk or any other structure which would reduce visibility,

traffic flow, or access to the demised premises without the prior written consent of Lessee, which consent shall not be unreasonably withheld. Lessor agrees, at its own expense, to maintain all common area in good repair, to keep such area clean, to remove snow and ice as much as practical, to keep such area lighted during hours of darkness when the demised premises are open for business and to keep the parking area properly striped to assist in the orderly parking of cars. Unless caused by the negligence of Lessee, its agents, employees, or contractors, any claims for damage to property and any claim arising from or out of the injury or death of any person while on the common area shall be the responsibility of Lessor, and Lessor agrees to carry comprehensive general liability insurance, with Lessee named as an additional insured on ACORD 27 form, on the common area, with a combined single limit for bodily injury and property damage in an amount sufficient to protect Lessor and Lessee, but in no event will such insurance be in an amount less than a combined single limit of $1,000,000.00 per occurrence.

VI. MAINTENANCE. Lessor represents and warrants that the demised premises and the entire Shopping Center: (1) are well built, properly constructed, structurally safe and sound; (2) during the term of this Lease and any renewals hereof, it will so maintain them; and, (3) the entire common area of the Shopping Center and the demised premises conform (or shall conform after notice from the appropriate governing authority) to all applicable requirements of the Americans with Disabilities Act of 1990, as amended, Pub. L 101-336 42 U.S.C. 12101 et seq., and the administrative regulations promulgated thereunder. Lessor shall maintain at its cost and expense in good condition and shall perform all necessary maintenance, repair, and replacement to the exterior of the demised premises including,

but not limited to, the roof, all paved areas, foundation, structural floors, exterior and load-bearing walls, all exterior utility lines and pipes, and all other structural portions of the, building during the term of this Lease and any renewal periods. Lessee assumes liability for damage to plate glass windows and doors. Lessee shall maintain the interior of the demised premises during the term of this Lease and any renewal periods and shall return the building to Lessor thereafter in its same condition, ordinary wear and tear excepted. Lessor has the right, at any time for emergencies, to enter the demised premises periodically, at any reasonable time, to inspect the condition of the demised premises and to make repairs. All repairs, restorations, or payments which are obligations of Lessor, shall be completed or made within a reasonable time. Should Lessor neglect or refuse to make or commence such repairs, restorations, or payments within thirty (30) days after written notice has been given by Lessee (no notice is required, however, in emergency situations when property loss or injury to persons is threatened), Lessee, without liability or forfeiture of its term or terms herein, may make or perform such construction, repairs, restorations, maintenance, cleaning, or payments, and following a 30 day notice to Lessor of monies due, deduct the cost thereof, (deduction not to exceed 50% of the monthly rental during any given month) and the cost of damage to Lessee's property from the rent or other monies thereafter payable. Any such deductions shall not constitute a default by Lessee unless Lessee shall fail to pay the amount of such deduction to Lessor within thirty (30) days after a final adjudication by a court of competent jurisdiction that such amount is owing to Lessor. Any repairs or other work done by Lessor shall be performed so as to cause the least interference possible with Lessee's operation.

As additional rental, Lessee agrees to pay to the Lessor in advance on the first day of each month, the costs for management, taxes (if any), pest extermination and control, insurance, utilities, security policing, cleaning, lighting maintenance and operation, grounds maintenance, repairs, painting, reserve for paving and striping, equipment including heating and cooling equipment service and maintenance and other expenses incurred in operation of the demised premise and common areas of the Shopping Center. Lessee shall pay monthly a basic minimum charge of $1.00 per square foot per annum of the area of the demised premises per year at the commencement of the Lease and until further notice is provided herein.

It is understood and agreed that the charge imposed hereby shall constitute a basic minimum charge subject to adjustment to the extent that any and all costs incurred by the Lessor in maintaining and operating the said Shopping Center shall increase, and that in addition to such basic minimum charge, Lessee shall pay as herein provided Lessee's pro rata share of any and all increases based upon the percentage which the area of the demised premises bears to the total leasable area in the Shopping Center.

VII. FIXTURES AND EQUIPMENT. Lessor shall at all times furnish heating, lighting, plumbing, and air conditioning equipment in the demised premises and shall be responsible for the entire cost of major repairs and replacement of all such equipment. Lessee shall be responsible for the entire cost of minor repairs and routine maintenance. Minor repairs are defined as any repairs costing less than $200.00 per occurrence, and major repairs are defined as any repairs costing $200.00 or more per occurrence. Lessee shall at all times have the right to remove any fixture or item of

equipment installed by it in the demised premises, provided, however, that it repairs any damage which may be caused by such removal. Lessor warrants to Lessee that upon acceptance of the demised premises, the condition of the demised premises will be in good order, and that all plumbing and sewage facilities, all mechanical equipment, including but not limited to, air conditioning, heating, and sprinkler system, if any, will be operative and mechanically sound. Lessor will, at its cost and expense, supply any apparatus, appliance, or material and will cause work to be done in and about the demised premises which may be required or ordered by any lawful authority, unless required as a result of Lessee's specific use of the demised premises.

Lessee shall keep in force during the term hereof and any renewal periods a maintenance contract covering the heating, ventilating, and air conditioning system. The contract shall provide for quarterly servicing of all such equipment and shall be with a contractor reasonably acceptable to Lessor. Lessee shall provide Lessor with a copy of the maintenance contract at any time Lessor may request.

VIII. ENTRANCES. Lessee shall have unrestricted use and access to all entrances, passways, and delivery lanes to the demised premises and easements adjacent thereto. Minor interruptions for service and repair excluded.

IX. UTILITIES. Lessee shall have the right to enter into agreements with public utility companies and the Mississippi Band of Choctaw Indians, or any or its agencies or departments, subject to the provisions of this section, to provide utility services, including, but not limited to gas, water, electricity, telephone, television, and sewer facilities, necessary to the full enjoyment of the leased premises and the development thereof in accordance with the provisions of this Lease, which

agreements shall be binding upon any sublessees or other occupants of the leased premises.

Utility Deregulation.

A. Landlord Controls Selection. Lessor had advised Lessee that presently Central Electric Power Association is the utility company selected by Lessor to provide electricity service for the Choctaw Town Center. Nothwithstanding the foregoing, if permitted by law, Lessor shall have the right at any time and from time to time during the Lease Term to either contract for service from a different company or companies providing electricity service (each such company shall hereinafter be referred to as an "Alternative Service Provider") or continue to contract for service from the Electric Service Provider. Lessor shall notify Lessee within thirty (30) days in the event Lessor contracts with another utility provider.

B. Tenant Shall Give Landlord Access. Lessee shall cooperate with Lessor, the Electric Service Provider, and any Alternative Service Provider at all times and, as reasonably necessary, shall allow Lessor, Electric Service Provider, and any Alternative Service Provider reasonable access to the demised premises' electric lines, feeders, riser, wiring, and any other machinery within the demised premises.

C. Lessor Not Responsible for Interruption of Service. Lessor shall in no way be liable or responsible for any loss, damage, or expense that Lessee may sustain or incur by reason of any change, failure, interference, disruption,

or defect in the supply or character of the electric energy furnished to the demised premised, or if the quantity or character of the electric energy supplied furnished to the demised premises, or if the quantity or character of the electric energy supplied by the Electric Service Provider or any Alternative Service Provider is no longer available or suitable for Lessee's requirements, and no such change, failure, defect, unavailability, or unsuitably shall constitute an actual or constructive eviction, in whole or in part, or entitle Lessee to any abatement or diminution or rent, or relieve Lessee from any of its obligation under the Lease.

X. TAXES AND ASSESSMENTS. Lessor shall pay at its cost and expense all taxes, assessments (including special assessments), and charges of a similar nature which may be levied by any governmental entity with respect to the demised premises. Lessee shall pay at its cost and expense all sales, personal property taxes and assessments which may be levied by any governmental entity with respect to Lessee's merchandise inventory, trade fixtures, or business operation.

XI. ASSIGNMENT AND SUBLETTING. Lessee may not assign or sublet the whole or any part of the demised premises without the prior written consent of the Lessor. Following any subletting or assignment the Lessee shall not be relieved from any of the terms and conditions of this Lease. After such subletting or assignment, the word Lessee as used herein shall also mean any such subtenant or assignee. Lessee shall, however, have the right, without Lessor's consent, to enter into an assignment of this Lease or a sublease of the demised premises to the parent corporation of Lessee, any subsidiary corporation of Lessee or Lessee's parent

corporation, any corporation succeeding to substantially all of the assets of Lessee as a result of a consolidation or merger; provided, however, that the other corporation shall assume in writing Lessee's obligations hereunder.

XII. SIGNS. Lessor agrees that it will provide and install LesseeÁs standard yellow face internally illuminated 24A letter sign mounted on a raceway as shown on Exhibit "D" attached hereto and made a part hereof, on the exterior of the demised premises. Two (2) tower signs have been erected to advertise tenants in the Shopping Center, and Lessor agrees to provide and install Lessee As sign face on each tower sign in a style and color consistent with its standard signs. All signs provided by Lessor on the behalf of Lessee shall be installed by September 30, 2000 and have prior written approval from Kathy Gannon, Exterior Sign Manager for Dollar General. Lessee agrees that any exterior signs it installs pursuant to this provision shall be in compliance with applicable enterprise and governmental regulations, if any. Any new signs in the future, to replace signs being provided by Lessor currently will be provided by Lessee.

XIII. LESSEE'S INSURANCE. At all times Lessee occupies the demised premises, Lessee shall, at its sole cost, carry and maintain comprehensive general liability insurance insuring Lessee against claims for injury, wrongful death, or property damage occurring in the demised premises with combined minimum policy limits of $2,000,000 per occurrence. Lessor shall be named as an additional insured under Lessee's insurance subject to the provisions of this Lease. Lessee may provide the insurance herein required in any blanket policy or policies which it carries. Upon written request, Lessee shall provide Lessor with a photocopy of the certificate of insurance as evidence of such coverage. All policies

shall contain a clause stating that there shall be no reduction, cancellation or non-renewal of coverage without giving Lessor thirty (30) days prior written notice.

XIV. DAMAGE TO BUILDING. If all or any portion of the demised premises shall be condemned by lawful authority as unsafe or unfit for use, or if they become partially or wholly destroyed or damaged by fire or other casualty such as to render them unrenantable, this Lease shall, at the option of either party, terminate unless the demised premises can be repaired or restored within one hundred eighty (180) days. During any such reconstruction period the Lease shall be continued, but the rent shall be equitably abated during the period of time while the demised premises cannot be occupied. Any rental paid in advance and at the time unearned shall be refunded. Should the demised premises be damaged but remain tenantable, Lessor shall immediately repair the damage, and there shall be an equitable abatement of rent during the period of repair or restoration.

XV. CONDEMNATION AND EMINENT DOMAIN. If the entire demised premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, or conveyance shall be made in lieu there of this Lease shall terminate and expire as of the date of such taking, and the parties shall thereupon be released from any further liability hereunder.

If a portion of the space is taken, or conveyance made in lieu thereof, Lessor or Lessee may at is option terminate this Lease on thirty (30) days written notice. If this Lease is not terminated then the rent and other charges herein reserved shall be ratably apportioned according to the space so taken, and Lessor shall, at its own expense, restore the remaining portion of the

Lease premises to a single architectural unit. The cost of LessorÁs obligation hereunder shall be limited to the net proceeds of the condemnation award actually received and retained by Lessor.

All compensation awarded or paid upon such a total or partial taking of the leased premises shall belong to and be the property of Lessor without any participation by Lessee.

It is mutually agreed that (i) any reduction in the parking area, number of parking spaces in the leased premises and/or restriction on the number of motor vehicles that may enter the leased premises by action order of any governmental authority, quasi-governmental authority, and/or by any court having jurisdiction in the premises shall not constitute such a taking or condemnation under this Lease that would entitle Lessee to terminate the Lease, (ii) any environmental condemnation and/or compliance by Lessor with any order, rule or regulation of any such authority, with any judicial decree, and/or any existing or future law shall not constitute a default under this Lease by Lessor so as to entitle, Lessee to terminate the Lease and the Lease shall remain in full force and effect, and (iii) as between Lessor and Lessee, Lessor may but shall not be obligated to comply with any such order, rule, regulation, judicial decree or law.

XVI. DEFAULT BY LESSEE. The happening of any one or more of the following listed events (hereinafter referred to as %Event of DefaultÁ) shall constitute a breach of this Lease agreement of the part of the Lessee.

A. The filing by, against or on behalf of Lessee of any petition or pleading to declare Lessee a bankrupt, or the adjudication in bankruptcy of Lessee under any bankruptcy law or act.

B. The failure of Lessee to pay any rent or other payment due under this Lease agreement and the continued failure to pay the same for thirty (30) days or more.

C. The failure of Lessee to fully and promptly perform any act required of it in the performance of this Lease or to otherwise comply with any terms or provisions thereof and the continued failure to perform or comply for thirty (30) days or more after written notice of same.

D. The appointment by any court or under any law of a receiver, trustee or other custodian of the property, assets or business of Lessee.

E. The assignment by Lessee of all or any part of its property or assets for the benefit of creditors.

F. The levy of execution, attachment or other taking of property, assets or the leasehold interest of Lessee by process of law or otherwise in satisfaction of any judgement, debt or claim.

Upon the happening any event of default, Lessor, if it shall elect, may (1) collect each installment of rental and other payment hereunder as and when the same matures, (2) accelerate rents and other payments for remainder of the term of this Lease, or (3) Lessor, or any other person by its order, may, with demand or notice, to Lessee, reenter the premises, without process of law, and without being liable for any prosecution therefore, and may either elect to terminate this Lease or if Lessor desires, not terminate the Lease, but terminate the right to possession and occupancy and relet the said premises to any person, firm or corporation, and the agent of the Lessee or otherwise, for whatever rent it shall obtain, applying the avails of such letting first to the payment of such expenses as the Lessor may incur

in the reentering and relating of same, and then to the payment of the rent or any other payments or amounts due hereunder and the fulfillment of the LesseeÁs covenants, and paying over to the Lessee the balance, if any; and in case of any deficiency, the Lessee shall remain liable therefore. Lessee waivers service of any demand for payment of rent or notice to terminate or demand for possession of the premises, including any and all other forms of demand and notice prescribed by applicable law.

The remedies, rights, and privileges of Lessor in case of default of Lessee as enumerated above shall not be exclusive; and, in addition thereto, Lessor may exercise and enforce all rights in law and in equity which it may otherwise have as a result of said default. Lessee acknowledges that payments accepted by Lessor while Lessee is in default are accepted with full reservation of all rights hereunder by Lessor.

XVII. LESSOR DEFAULT. If Lessor shall fail to perform any term or condition under this Lease, Lessor shall not be in default, unless such failure shall have continued for a period of thirty (30) days after written notice by Lessee to Lessor, specifying such failure, provided, if Lessor shall have commenced to cure such failure within such thirty (30) day period, and seeks to cure such failure to completion, Lessor shall have such additional time as Lessor may reasonably need in order to complete such cure. The aforementioned periods of time permitted for Lessor to cure shall be extended for any period during which Lessor is delayed in curing, due to casualty, acts of God; strikes or other labor troubles; shortages of labor, equipment or materials; power shortages; promulgation of new laws; difficulties in scheduling work or other matter; acts or omissions by Lessee; and other causes beyond LessorÁs reasonable

control. If Lessor shall fail to cure within the times permitted for cure herein, Lessor shall be subject to such claims for damages and remedies as may be available to Lessee, provided, in recognition that Lessor must receive timely payment of rent in order to operate the property, Lessee shall provide Lessor with 30 day notice of its intent to deduct from rent, and such deduction shall be no more than 50% of the monthly rental during any given month. As a condition to the recovery of any damages against Lessor, Lessee shall use reasonable efforts to mitigate such damages.

XVIII. HOLDING OVER. Any holding over by Lessee beyond the original term of this Lease or any renewal period thereof shall be on the same terms and conditions as contained herein, and shall be a periodic tenancy terminable by either party upon thirty (30) days prior written notice to the other party.

XIX. MUTUAL RELEASE. Except as otherwise provided herein, Lessee hereby releases Lessor from all liability resulting from loss or damage caused by fire or other hazards to Lessee's contents in the Demised Premises even if such fire or other hazards shall be brought about by the negligent act or omission of the Lessor, its agents, or employees. Lessor hereby releases the Lessee from any and all liability for any loss or damage caused by fire or other hazards to the Demised Premises even if such fire or other casualty shall be brought about by the negligent act or omission of the Lessee, its agents, or employees. Lessor and Lessee agree that all insurance policies shall include a clause waiving rights of subrogation and recovery against the other.

XX. QUIET POSSESSION. Lessor covenants that it will put Lessee into complete and exclusive possession of the demised premises, free from all orders, restrictions and notices of any public or quasi-public authority,

and that if Lessee shall pay the rental and perform all the covenants and provisions of this Lease to be performed by Lessee, the Lessee shall during the term demised and any renewal periods, freely, peaceably and quietly occupy and enjoy the full possession of the demised premises, and the common areas thereto belonging, and the rights and privileges granted without hindrance. In addition, Lessor agrees to indemnify, defend, and hold Lessee harmless from any and all claims seeking to prevent Lessee from quiet and complete possession of the demised premises. If at any time during the term demised the title of the Lessor shall fail or for any reason it shall be ordered by a court of competent jurisdiction that Lessor is unable to make this Lease for the term or on the conditions set forth, the Lessee shall, in addition to all remedies available at law or in equity.

XXI. RENT PAYMENT Lessee shall make rent checks payable to Choctaw Shopping Center and mail them to the following address: Attn: Phillip Martin, Chairman, P.O. Box 6001, Philadelphia, MS 39350, Tax ID # 64-0345731.

XXII. ENTIRE AGREEMENT. This instrument and its attachments, if any, contain the entire agreement between the parties and there are no covenants, express or implied, except as contained herein. No statement, promise or inducement made by either party or agent of either party that is not contained in this written agreement shall be valid or binding. No waiver of any condition or covenant of this Lease by either party shall be deemed to imply or constitute a further waiver of the same or any other condition or covenant of the Lease.

XXIII. LESSEE'S BUSINESS OPERATION. Lessor and Lessee agree that nothing in this Lease shall be construed to imply that Lessee is required to conduct its business in any particular manner or for any specified number of hours per day or week, or to limit the number of hours per day or week that Lessee may operate in the Demised Premises, or as creating an implied or expressed obligation upon Lessee to continuously occupy or operate a business in the Demised Premises. If Lessee intentionally closes its business operation in the Demised Premises to the public for a least thirty (30) consecutive days, Lessor shall have the right to terminate this Lease thereafter by giving thirty (30) days prior written notice to Lessee.

XXIV. HOLD HARMLESS. Lessor agrees to hold Lessee harmless from any and all claims which may arise from, on, in or about the demised premises when such claims arise out of or are caused in whole or in part by a defective, dangerous, or unsafe condition of the demised premises, equipment, fixtures, or appurtenances required by law or the terms hereof to be maintained by Lessor. Lessee agrees to hold Lessor harmless from any and all claims which may arise in the demised premises when such claims arise out of or are caused in whole or in part by a defective, dangerous, or unsafe condition of the demised premises, equipment, fixtures, or appurtenances required by law or the terms hereof to be maintained by Lessee.

XXV. CAPTIONS. All captions and headings are for convenience of reference only and in no way shall be used to construe or modify the provisions set forth in this Lease.

XXVI. NOTICES. All notices required under this Lease shall be deemed to have been properly served if delivered in writing personally or by registered or certified

mail, national recognized overnight courier, for via electronic facsimile with proof of transmission to Lessor, Choctaw Shopping Center Enterprises, Attn: Phillip Martin, Chairman, P.O. Box 6001, Philadelphia, MS 39350, or such other place or places as it may designate in writing from time to time, or to Lessee at Dolgencorp, Inc., Attention: Director of Store Growth and Development, 100 Mission Ridge, Goodlettsville, Tennessee 37072. Date of service of a notice served by mail shall be the date on which such notice is deposited in a post office of the United States Post Office Department.

XXVII BINDING EFFECT. This Lease shall bind and inure to the benefit of the parties hereto, their heirs, successors, executors, administrators, and assigns.

XXVIII. COMPLIANCE WITH LAWS. Lessor shall, at Lessor's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to the physical or environmental condition of the Shopping Center or the demised premises, including without limitations laws and regulations pertaining to disabled persons, asbestos, radon and hazardous substances. In the event asbestos or any other materials deemed hazardous by a governing authority (provided such hazardous material has not been introduced by Lessee) is required by law to be removed from the demised premises, Lessor shall perform such removal at its own cost and expense. Lessee shall, at Lessee's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to Lessee's specific use of the demised premises.

XXIX. SPECIAL STIPULATIONS.

a. Scope of Work. See Exhibit "C" attached hereto and made a part hereof.

b. Estoppel Certificates. Upon the reasonable request of either party, Lessor and Lessee agree to execute and deliver to the other within ten (10) days after receipt of the request, a written instrument, (a) certifying that this Lease has not been modified and is in full force and effect or, if there has been a modification of this Lease, that this Lease is in full force and effect as modified, stating such modifications; (b) stating that the fixed monthly rent has not been paid more than thirty (30) days in advance, or if so, the date to which it has been paid; (c) stating whether or not, to the knowledge of the party executing the instrument, the other party hereto is in default and, if the party is in default, stating the nature of the default; and (d) stating the date of this Lease.

c. Subordination, Non-Disturbance, and Attornment. Lessee agrees that this Lease shall, at Lessor's request, be subject and subordinate to any mortgage or deed of trust hereafter placed upon the Shopping Center.

d. Invalidity of Certain Provisions. If any provisions of this Lease shall be invalid or unenforceable, the remainder of the provisions of this Lease shall not be affected and every other provision of this Lease shall be enforceable to the fullest extent permitted by law.

e. No Waiver. The failure of the Lessor, or Lessee to insist upon the strict performance of any provisions of this Lease, or the failure of Lessor or Lessee to exercise any right, option or remedy contained in this Lease shall not be construed as a waiver for the future of any such provision, right, option or remedy, or as a waiver of any subsequent breach. No provision of this Lease

shall be deemed to have been waived unless such waiver shall be in writing signed by the party to be charged.

f. Mechanics Liens. Lessee shall not allow, and Lessor shall not be responsible for any mechanics liens filed against the demised premises or Shopping Center arising from work performed, or materials supplied to the demised premises or Shopping Center by Lessee or Lessee's agents, employees, contractors, subcontractors or materialmen. Lessee agrees to fully indemnify and hold harmless Lessor from and against any such claims and liens and Lessee shall immediately pay and discharge the same.

g. Force Majeure. If either party shall be prevented or delayed from punctually performing any obligation or satisfying any condition under this Lease by any strike, lockout, labor dispute, inability to obtain labor or materials, Act of God, governmental restriction, regulation or control, enemy or hostile governmental action, civil commotion, insurrection, sabotage, fire or other casualty, or any other condition beyond the reasonable control of the responsible party, then the time to perform the obligation or satisfy the condition shall be extended for a period of time equal in length to the length of the event.

h. Alterations. Lessee shall not make any structural alterations or additions to the demised premises without first obtaining the Lessor's written consent. At the expiration of the Lease, Lessee shall remove all non-structural alterations which were made in the demised premises by the Lessee.

XXVII. GOVERNING LAW. This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4,

Choctaw Tribal Code). Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act. Nothing contained in this agreement or any related document shall be construed or deemed to provide recourse to Silver Star assets.

XXIX. SPECIAL PROVISIONS. The Lessee by the acceptance of this Lease acknowledges that the demised premises and the aforementioned %ground leaseÁ are upon land held in Trust by the United States of America for the Mississippi Band of Choctaw Indians. Lessee further acknowledges that because said property is held in trust status, the following provisions shall apply:

A. While the Leased premises are in trust or in restricted status, all the LesseeÁs obligations under this Lease and the obligations of his sureties, if any, are to the United States of America for the Mississippi Band of Indians. Lessee further acknowledges That because said property is held in trust status, the following provisions shall apply:

B. Nothing contained in this Lease shall operate to delay or prevent a termination of federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the Lease; however, such terminations shall not serve to abrogate the lease. The owners of the land and the Lessee and his surety or sureties, if any, shall be notified of any such change in the status of the land.

C. The Lessee agrees that it will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

XXX. SUBORDINATION. At such time as Lessor and any mortgagee or proposed mortgagee of the premises may in writing request, the Lessee agrees that this Lease shall be and the same is hereby made subject and subordinate to the lien of any present or future mortgage (which term shall include all security instruments) of (1) the demised premises made by the Lessor, (2) the Shopping Center made by Lessor and Fee Owner if Lessor is not the Fee Owner, and (3) the LessorÁs leasehold interest in the demised premises if LessorÁs estate is a leasehold; and any one or more of these. Lessee agrees upon demand without costs to execute any instrument as may be requested to additionally evidence such subordination (it being agreed by lessee that no additional instrument or evidence is necessary for its subordination to be effective.)

IN WITNESS WHEREOF, the parties have executed this Lease in duplicate the day and year first above written.

Witness to Lessor:

LESSOR: CHOCTAW CENTER ENTERPRISES

/s/ Illegible

By: /s/ Phillip Martin
Authorized Signature

Witness to Lessee:

LESSEE: DOLGENCORP, INC.

/s/ Illegible

By: /s/ Terri F. Holder
Terri Holder
Director of Company
Growth Administration

Appendix G

Deposition of Louise Wilson

January 4, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 4:08-cv-22-TSL-JCS

DOLGENCORP, INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND

Plaintiffs,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (in his official capacity), and JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOHN DOE, SR. AND JANE DOE

Defendants.

DEPOSITION OF LOUISE WILSON

APPEARANCES NOTED HERIN

TAKEN AT INSTANCE OF: PLAINTIFFS
DATE: JANUARY 4, 2011
PLACE: OFFICE OF THE ATTORNEY GENERAL
354 INDUSTRIAL ROAD
CHOCTAW, MISSISSIPPI
TIME: 9:54 A.M.

REPORTED BY: Connie Chastain, RMR
CSR NO. 1025

DAVIS COURT REPORTING
Post Office Box 16147
Jackson, Mississippi 39236-6147
(601) 991-0079
www.daviscourtreporting.com

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[13] A. I understand it was created back in 1986, somewhere around there. I know it was a few years before I started working with the program.

Q. Okay. What is the—and sometimes timeframes are tricky, so what—I'm going to say what is the purpose of this program, but I guess what I want to make clear is if it changed over time, if the program had a different purpose in 1996 than it has now, please let me know. I'm assuming that didn't happen. But my question is what is the purpose of the program? What's it designed to do?

A. Okay. The program was designed to hire young people to get into positions for a short time with mentors or someone who would supervise them and help them with the different job positions. The other thing was the program was designed to not only do that, but also to help them set goals and objectives for their lives.

And we had—it was like we had two or three components within the program. First component is for community service, which means these younger groups of kids do community services to help the elderly and handicapped people in the community by doing—cutting grass, cleaning their house and things of that nature, which they can't do themselves.

The second component is the group were onsite

* * * *

[19] A. No.

Q. —Program—

A. No.

Q. —in the last—since the time you described?

A. That's right. There is another program called—I believe it used to be called IEP, and it is a youth funded program. Judy Lindsey is the Program Director. And that is for underprivileged, very underprivileged youth.

Q. Now, when the youth come to—for the summertime program, do you consider the youth to be employees of the Choctaw Youth Opportunity Program?

A. Excuse me. When they come or after they've applied?

Q. After they've been accepted into the program.

A. Oh, yes.

Q. And do you make any federal withholdings for taxes from their paychecks?

A. Yes.

Q. And do they make federal—do y'all make federal withholdings for Social Security?

A. Yes.

Q. And do y'all make federal withholdings for Medicare?

[20] A. I think all of those, yes, are taken care of when it goes to finance. They take all of that out.

Q. And do you maintain Workers' Compensation insurance for—

A. Yes, yes.

Q. And do y'all set the schedules that they work?

A. As to?

Q. As to we're going to have you work 40 hours a week, 20 hours a week?

A. Oh, yes. Yes.

Q. And y'all actually write the checks for their wages?

A. Yes. When we get a W-2 we send it—not a W-2, a T&A, we send it to the tribal finance offices whereby they do that for everybody that works.

Q. Now, what are the requirements for a young person to become a participant in the program?

A. In the past—the reason I'm saying past, it's just changed this year. In the past you could be 14 on up to age 25. But this coming year it's going to be 15 up to age 25. In the past we have applications whereby they fill it out, but the requirements have been that they are at least one-half and above members of the tribe, that they attend school full-time, whether it's college or regular school, and that they have a grade [21] average of a C and above, and have a TB skin test done. And then also turn in a—I can't think of the name of it, but in case they're going to work with daycare we have to have their immunization records. Those are the basic requirements.

Q. Do the minors need parental consent to participate in the program?

A. Monitors?

Q. Minors.

A. Oh, minors, yes.

Q. And do all the participants in the Youth Opportunity Program have to sign waivers to participate in the program to not sue the tribes?

A. The parents usually sign waivers—well, wait a minute. What was the question again?

Q. Are the participants required to execute a waiver of liability, an agreement not to sue the tribe to participate in the program?

A. Waiver as such—well, let me think here. We do have a waiver, but I'm not sure if it includes something as what you're explaining. The waiver we have is—it may and may not.

Q. Okay.

A. You know—

Q. If—

[22] A. I'm not sure.

Q. —you don't remember.

A. I'm not sure.

Q. That's another thing I should have explained at the beginning. If you don't remember, please don't guess.

A. Okay.

Q. Just tell me I don't remember that.

A. I don't remember that.

Q. Okay. Now, is the program a voluntary program in that you are not required to participate—

A. Yes.

Q. —if you don't want to?

A. Yes.

Q. Do you have to do any sort of criminal history check on the—

A. Yes.

Q. —participants?

A. Yes.

Q. Is there a—let me back up. In 2003 when—how many hours—well, let me back up. Do the participants get paid for all hours they spend in the program in all—in the three phases you described to me earlier?

A. They got paid for the first and second phase, [23] but on the youth council, voluntary.

Q. Was there a set amount of time participants were supposed to work on a weekly basis in the first and second phase?

A. Yes.

Q. And how much was that?

A. Forty hours a week.

Q. And how many weeks did the program—in 2003 would the program last?

A. It was up to six weeks.

Q. And that would be the weeks that they could be in a position in either the first or the second phase—

A. Yes.

Q. —that they were getting paid for?

A. Yes.

Q. I take it youth council would be year-round?

A. Yes.

Q. Now, in the second phase in 2003, can you give me a rough estimate of how many different potential places there were to assign youth to?

A. If I can recall, it was up to a hundred and—105 different job placements, and many of those may have had one or two or maybe three participants in the same position or same job site.

Q. And do you have any perception of out of the [24] 105 potential placement sites what number were tribal entities versus what number were non tribal entities?

A. I don't know.

Q. Now, in 2003 how many applicants were you able to accept as participants in the program?

A. Three-hundred-fifty regular YOP, and I believe it was 50 college participants. So that's close to 400, a total of 400.

Q. And each of these 400 was expected to work 40 hours a week for six weeks and be paid minimum wage for those hours?

A. Yes, except college participants worked up to 11 weeks.

Q. Now, over the course of the six-week period in 2003, how many different placements would you make for each participant in the program?

A. Could you state that again, please.

Q. Yeah. Was it normal that if you—if somebody was in phase two—you talked about the eye doctor earlier.

A. Uh-huh.

Q. Would it be ordinary that the person who was placed there would work all six weeks at the eye doctor?

A. Oh, yes, normally.

Q. And that was true for most of the placements, [25] that they would have one placement for a six-week period?

A. Yes.

Q. Now, how was the—in 2003 what was the process that you used to obtain the agreement of non tribal entities to participate in the program to let you place youth with them?

A. In agreement, did you say? Or what was the agreement?

Q. Well—

A. What was the process of the agreement?

Q. What was the process of finding places that would accept your youth?

A. Okay. That year or every year we always sent out what we call a survey. And the survey asked all the entities if they are interested in having a youth placed within their program to work. And we would give them the dates as to when they would work. If they were on—the questionnaire, it also states male, female, age group, college or non college. And then we also request for them to give us a job description. And we give them a deadline as to when to send those surveys back.

And when we get them back we try to match them with the applicant's interest as to where they are working or with their class studies or something like that. Because some may be going into the health field.

[26] Q. Now, was the process the same for the tribal entities?

A. Yes, yes.

Q. Do you maintain—does the Youth Opportunity Program maintain copies of the surveys—

A. No.

Q. —after it receives them back?

A. No. I mean, we had them for that year, but then after the fiscal year ends, most of them are boxed. But surveys like that, we didn't keep. We did keep the names of the ones who responded, but we did not keep those surveys itself.

Q. And—

A. Excuse me.

Q. And when you say you kept the names of the ones who responded, where would you keep those names?

A. We would have a—just on a form or a paper and put it in the file, if we have it.

Q. And would that be just a file—

A. Yeah.

Q. —of placement, for the placements?

A. Yeah. Wherever the secretary had her book stuff went—it went with it.

Q. Other than the survey, was there any agreement in writing between the Youth Opportunity Program and the [27] entities that were accepting the placements?

A. No.

Q. Are you still using the survey process today to find the—

A. Yes, yes.

Q. Would you have—when you received the surveys back did anybody from the Youth Opportunity Program interview or talk to—

A. Yes.

Q. —the employers about placing youth with them?

A. Yes.

Q. And who would do that?

A. The Activity Youth Coordinator.

Q. And who was that in 2003?

A. Glenda Denson, or Glenda Isaac. She was Glenda Isaac at that time.

Q. And did Glenda, when carrying on these conversations, have any sort of form that she would use to obtain specific information from the employers or the businesses?

A. I don't know.

Q. And I take it, I'm not sure we said this already, but you were Program Director already in 2003?

A. Yes.

[28] Q. Was there any specific information that you instructed Glenda that she needed to get from the businesses for the placement of the students?

A. The only thing I had instructed was to make sure that the placements were a safe environment for the young people who are coming to work there.

Q. And do you know what questions Glenda would ask to make that determination?

A. No, no.

Q. Was there any other employee of the Youth Opportunity Program other than Glenda who would have directly spoken to businesses about placing youth opportunity participants in their businesses?

A. No.

Q. Once you placed a participant with a business, what was the business' role at that point?

A. Once they are placed there I'm usually informed by a—we have one of these short memo things in the office. If she doesn't inform me verbally she will let me know by those little forms. But at any rate, the supervisor at The Dollar Store usually makes sure that they—their time sheets. They sign in and sign out, more or less supervise them on those things, and then give instructions as to what to do while they're employed within their program.

[29] And the other thing that is instructed is to teach them. If there is anything that needs to be taught within that program to teach them. For instance, if it's going to be cash register, to teach them how to use the cash register. Or stamping things or something like that, to teach them all of those and give instructions. It's more or less we expect the supervisors to teach them and to keep their time.

The other thing is that if they are not in—not doing their work or if other things come up that they are—they are instructed or they should know to inform them that there are consequences to face if they don't do their job.

Q. Were the employers asked to provide any sort of evaluation of the participants in their performance over the course of the time they were—

A. Yes.

Q. —working there?

A. Yes.

Q. Was there a specific form used for that purpose?

A. Yes.

Q. Is that form still being used today?

A. Yes.

Q. And what type of questions are on that form [30] for the business to answer about the participant?

A. Whether the participant is on time, courteous, whether they seem to enjoy the work that they're doing, whether or not they get along with other people that works there. Whether or not they understand their job description, whether or not they volunteer work while they're there. And that's about all I can remember, but there are several other.

Q. Now, once these forms—I take it these forms came back to the Youth Opportunity Program from the businesses?

A. Yes.

Q. What then did the Youth Opportunity Program do with the information it got from these forms?

A. We usually keep the latter because they're evaluated. If they're college students they're evaluated every three weeks, but for regular YOP they're probably evaluated twice.

So for the latter one we will put in their file, but we would dispose of the first evaluation. But for the latter one we would go ahead and put in the file so that in the following year they need to review—if they want to review. Like if Ms. Denson wanted to review she could review.

Q. Did anybody with the Youth Opportunity Program [31] sit down with the participants and go over the evaluations they received from the businesses?

A. If it was negative, if the forms or the questionnaires were somewhat negative, then we would.

Q. Now, did the Youth Opportunity Program employ any individuals who would observe the participants at the various work sites?

A. Will you say that again, please.

Q. Did the Youth Opportunity Program have any employees who would travel around to the different businesses where the participants were to observe them doing their work?

A. Oh, yes, we had—yes.

Q. And how many of those individuals did you employ?

A. It depended on how many workers we had. Most of the time other communities received only one. Excuse me. But Pearl River would have maybe up to three.

Q. And would these—would these individuals normally be temporary employees—

A. Yes.

Q. —that were employed for the period—

A. Yes.

Q. —of the summer program? Just a reminder, please let me finish the question so she can take it [32] down.

A. I'm sorry.

Q. So Pearl River had three because it was the biggest location?

A. Yes.

Q. And would these people who would go out to the various sites, would they be older participants or would they be actual temporary employees?

A. Actual temporary employees.

Q. And how often did these—backing up, did these individuals have any duties other than to go observe the participant at the different workplaces?

A. No.

Q. And did these individuals create any records of their observations?

A. Somewhat if there was a concern.

Q. And who did these individuals report to?

A. Glenda Denson.

Q. And do you know if Glenda kept any records of these reports?

A. I don't know.

Q. Did you personally ever have the opportunity to go out and supervise any employees or any participants at the work sites where you had placed them? A. Occasionally.

[33] Q. What—do you have any recollection of ever going to Dollar General to observe any of the participants that you placed at the Dollar General at Town Center?

A. No.

Q. How many different places of—or placement locations would each of these temporary employees be responsible for visiting?

A. Could you rephrase that again, please.

Q. Yeah. Let me see if I can ask you this way. If I'm one of these individuals whose job is to go out and check on the participants at their locations, how many different locations am I supposed to go to in a week?

A. Okay. Well, it's every other day is the norm, every other day. Pearl River, however, if we have—let's say each—we call them monitors. So if they have up to 45 or 50 each sometimes, then they go about every third day. At least twice a week.

Q. And that would be—they would visit all the participants—

A. Participants that they have on their list.

Q. —at least twice a week?

A. Yes.

Q. Now, how many—coming forward to today, how [34] many currently placement positions do you have in the Youth Opportunity Program for participants, how many spots?

A. For?

Q. You said in 2003 y'all had 350 regular participants and 50 college participants.

A. Yes.

Q. Or about 400. How many do you have today?

A. Oh, 200, and that's including college.

Q. How many in 2003? What—do you have any rough estimate of how many youth would apply for the 400 positions?

A. Over 500.

Q. So the program could not take everybody who applied?

A. That's right. Yes.

Q. Do you want to take a break?

A. Yes.

MR. HAROLD: Okay. Let's take a break.

(BRIEF RECESS)

BY MR. HAROLD: (Continuing)

Q. Do you happen to know the size of the tribe's overall budget?

A. No. It changes from day-to-day, I believe.

Q. Okay.

[35] A. Because once we got our fiscal this year, that's when it went down that much more, so I don't know what the budget is.

Q. Now, do you know when the Youth Opportunity Program first began assigning participants to the Dollar General store at Town Center?

A. Let me think. That—1993 may have been the first and the last.

MR. KILGORE: It's 2003.

BY MR. HAROLD: (Continuing)

Q. 2003?

A. I'm sorry, 2003.

Q. Currently are any participants being assigned to the Dollar General store?

A. No, no.

Q. Do you know who at the Dollar General store agreed or requested, or how it happened to participate in the program?

A. I believe it was Dale Townsend.

Q. And tell me what you remember about that.

A. I didn't talk to him personally, but Ms. Denson, Ms. Isaac, reported to me that he had agreed, or they had agreed for these young—for participants to come and work there.

Q. Did you know anything else about the agreement [30] other than what Ms. Denson told you?

A. No.

Q. Did you know what type of work they were going to be doing?

A. No.

Q. Did Ms. Denson say anything else to you other than they've agreed to?

A. No.

Q. Do you know if Ms. Denson made any notes of her discussions with Mr. Townsend?

A. No.

Q. Would it have been her ordinary practice to put anything in writing about her discussions with the business?

A. Yes.

Q. And where would she make those notes?

A. She would have—in personal notes that she would have had.

Q. Did she keep a day planner or notebook?

A. Yes, she did have a day planner.

Q. Do you think she would have jotted it down in there?

A. Yes.

Q. Are those day planners maintained by the Youth Opportunity Program?

* * * *

[48] A. No.

Q. Now, what would the impact of the elimination of the Youth Opportunity Program—if that were eliminated what would your perception be would be the negative impact on the tribe?

A. I know that a lot of parents would be upset, but also many of our college participants are not of age yet to go and find employment in town or any other place. There would just not be any employment available for all our young people anywhere, whether it's in Newton, Carthage, Louisville, all these different areas that would just not be any employment. And even though we've had budget cuts, this has helped many of our college participants to make extra money to help them along the way for expenses.

Q. Would the elimination of the Youth Opportunity Program threaten the financial viability of the tribe?

A. No.

Q. Would the elimination of the Youth Opportunity Program damage government relations?

A. No.

Q. I'm going to now ask you about some documents. I've narrowed the stack down considerably.

MR. HAROLD: And I will just hand you this. Terry, I don't have an extra copy.

* * * *

[57] Exhibit 7.

(DOCUMENT MARKED EXHIBIT NUMBER 7)

MR. HAROLD: I screwed up. This is what happens when I don't let my secretary do this. I only have one copy of that.

BY MR. HAROLD: (Continuing)

Q. I'm going to hand you a document marked 000088, and I'm going to ask you to identify that for me if you recognize it.

A. Yes. This is a report that I had—I had done after Mr. and Mrs. Willis came into my office.

Q. I want to ask you. There's a-do you see the note at the bottom?

A. Yes.

Q. Would you read that to me, please.

A. This was Bailey's third placement since the program started.

Q. Why did you make that notation?

A. It was to let me know that if we placed him somewhere else, that will be a fifth time. And at that time—well, we just want to have it on a note so that the next year if he applied again that we want to make sure he's not going to be going from place to place again.

Q. Okay. Do you recall what the issue was that [58] resulted in him being moved from his first placement to Dollar General?

A. I can't—no.

Q. Does this note indicate that you were somewhat skeptical of Mr. Willis' complaint?

A. No.

Q. If he were being moved for a good reason, which I would assume you believed the complaint was, why would this be relevant?

A. We keep up with all the participants who have been moved more than once, just so that we would know for the next year.

Q. Actually it says here—when you say this was Bailey's third placement since the program started, is that indicating Dollar General was his third placement?

A. Let me think. I believe it was.

Q. So he had worked—he had been removed from two other placements prior to going to work for Dollar General?

MR. JORDAN: Object to the term removed.

MR. HAROLD: I'll rephrase.

BY MR. HAROLD: (Continuing)

Q. He had been placed at two other businesses or entities prior to being placed at Dollar General?

A. Yes.

* * * *

[71] A. Yes.

Q. And who do they elect?

A. They elect our tribal chief, our tribal Miko.

Q. And do they elect—I have an understanding there's also a council?

A. Yes. They have council from each of the communities. And it could be from one to three council members that are elected, and they are elected in—not on the same year. Some are elected in different years, but they do serve four years.

Q. And does the operation of the Youth Opportunity Program in any way come into play in the election of council members?

A. None other than our 18-year-olds voting for officials.

MR. HAROLD: All right. That's all I have.

MR. JORDAN: I will not be as long ago he was.

EXAMINATION BY MR. JORDAN:

Q. Really quick, I may have misunderstood, when you would go into Dollar General here at Pearl River at a time when Bailey Willis was there with your program—

A. Uh-huh.

Q. —did you say you did or did not see him?

[72] A. I did not see him.

Q. Okay. Of the 105 entities, and I don't know what you would call them where you placed them, what would be the proper word?

A. Job sites is what we called them.

Q. Of those job sites are you aware of any of the job sites that would not have received any benefit from having these young people in the program working for them?

A. Am I not aware?

Q. Of those 105 job sites—

A. Uh-huh.

Q. —as you placed a young man or woman in a position at that job site—

A. Uh-huh.

Q. —are you aware of any job site that did not receive benefit from that employment?

A. Oh, no, no.

Q. And an example, please, or in general tell me what the benefits are that the job sites would receive.

A. They receive paid hands that work within their program. For instance, it could be at the elementary school. They would be like a secondary teacher aide assistant, or in the cafeteria they work as a cook.

So all the supervisors have to do is keep up [73] with their time and give them any training. And according to our rules and regulations, any type of—I can't think. If there's anything that they did wrong that they have to come and just kind of talk to them about it. Those are the things that have to be done by the supervisor.

And, but they are paid employees. They're not paid by them. They are paid by our program. So it's free labor, more or less.

MR. JORDAN: Thank you.

EXAMINATION BY MR. KILGORE:

Q. Louise, in the initial questioning by Mr. Harold, you indicated that the YOP program set the work schedule, either 20 or 40 hours a week, but who is responsible for telling an employee, a YOP participant, what time to come to work and what time to go home?

A. On the rules and regulations it has on there 40 hours biweekly, but we also have a thing in there where the schools, of course, they start earlier, like from 7:00 to 3:30 or 7:30 to 3:30. And so we say in accordance to what your supervisor tells you you can work.

Q. And who would the supervisor be like at the Dollar General?

A. It would be Mr. Townsend.

* * * *

[75] Q. Later on in your explanation about the role of the individual businesses about doing time sheets and they supervise the workers and supposed to teach them skills, you said they were also responsible—telling you that when the YOP worker does not do their job.

A. Yes.

Q. What are the consequences if you get a report that a YOP worker violates the rules?

A. It's just like with any other tribal employee. At first they get a warning, second they get a—we have a

form—not form, but we have a report form whereby they let them know and they sign, participant signs. The next time it happens again, they are given that and they could be suspended up to five days, and the participant signs that also. And the third time will be up to the Program Director for termination, or given whatever the reason may be.

Q. Generally, what are your, expectations for individual YOP participants? What do you expect them to do?

A. We want them to become more responsible and to—well, to come in to work, be on time and to show that they can do whatever is expected of them at their job site whatever the job description may be. And that's basically what we want them to learn, and some [76] leadership skills.

Q. The work that your YOP participants do, is it the same kind of work that regular employees for that company would be paid for?

A. In some instances yea, because some of our young people are very well trained in computer language and things of that nature. And they can just come in and pick up whatever they're doing. And then our college participants especially, they may be specializing in a different particular—for instance, a paralegal, they could be almost finished with their college work and we would like for them to be placed within a entity that would have attorneys that could use them for the summer, and things of that nature.

And then we have—there's quite a few who have gone on and become employed with the particular entities that we have placed them with.

Q. Okay. If your YOP participant was stocking and bagging at Dollar General, is that—to your knowledge, is that something a regular employee would have been paid for?

A. Yes.

MR. KILGORE: I believe that's all I have.

MR. HAROLD: Beautiful. Oh, wait. I

* * * *

Appendix H

Louise Wilson Deposition Exhibit 5

Youth Opportunity Program Memorandum

YOUTH OPPORTUNITY PROGRAM
Phone: (601) 650-7321
MISSISSIPPI BAND OF CHOCTAW INDIANS
P.O. BOX 6010
CHOCTAW, MS 39350

Memorandum

Summer Employment Information/New Policies

These are a few information we need to inform you of that you may or may not be aware of:

1. All participants must work the day before and the day after a Holiday in order to get paid for that Holiday. (In this case it will be July 4th).
2. If a participant drives an automobile to work it will not be the responsibility of Y.O. P. Program if an accidents occurs during break for Lunch. It will be the owners responsibility. We encourage other participants not to ride in other people's vehicle. We leave it up to parents/guardian to inform their kids as to how to control the vehicle. If any of the community service workers drive to work the keys will need to be given to counselors for safe keeping until lunch, and after work. This will be so unless we receive a note from the parent(s) otherwise. Y.O.P. is not responsible during lunch or breaks. Only if the staff have them during breaks.
3. On-site workers need to make themselves available or fine their timekeepers during T&A time. All

T&A's will be kept by the supervisor. If T&A's are not signed by the time they are turned in to Y.O.P. office they will not be able to get their checks until after 1:00 o'clock Payday. Monitors and counselors will distribute all checks to their supervisors or participants as quickly as possible after 9:00 Thursday morning of the payday.

4. We encourage all participants who do not have a pictured ID to get one. The Choctaw communications office is available to do this for a fee of $5.00. This is so that a participant will be able to cash their checks at the bank. This is not a requirement.

5. All paydays are the same as tribal schedule. TA's are due Monday to Y.O.P. Office instead of Tuesday.

6. Also we are following the tribal policies for advance checks whenever a request evolves. Attached is a copy of the reasons and only way a participant will be able to get their checks early. Also, if a participants resigns, or is terminated they will not be able to get their checks until regular payday or if there is an emergency explained in the tribal policy.

Regular YOP participant will work for six weeks only from June 2, 2003 until July 18. No one will work during Choctaw Fair week. Regular college workers will work for 12 weeks starting May 19 until August 15, 2003.

Appendix I

Louise Wilson Deposition Exhibit 6

Youth Opportunity Program Rules and Regulations

Mississippi Band of Choctaw In
Youth Opportunity Program

Rules and Regulations

1. Participant must report to their designated worksite on time (or what Time is specified at the worksite).
2. Carry out your assigned duties or as instructed by your supervisor every day. You will receive a work break 2 times a day. Morning break will be at 10:00 a.m. to 10:15 and afternoon break at 2:00 p.m. to 2:25 p.m. or whatever time is set at your jobsite Please return to your worksite promptly after each break.
3. You are not to leave your worksite area at any time without you immediate supervisor's approval.
4. If you are sick and cannot come to work, you or your parents/guardian must call in sick to your immediate supervisor or to the YOP office. If someone else informs or calls your supervisor, you receive an unexcused leave. You must go to the hospital or community clinic for treatment and bring in a doctor's excuse if you are out for two or more days. Also, you will not be paid for being on sick leave and no make-up for the days missed will not be allowed.
5. Non-tribal sponsored activities must be submitted in writing for consideration and approval by the program director one (1) week prior to activity. It will be up to the discretion of the program director

whether you will receive a salary for the days approved for your participation in an activity.

6. Excused leave will be payable to you if you participate in a Tribal sponsored activity. Participants who participate in any activity must have their coaches or coordinators submit name(s), date, and the activity for consideration and approval by the program director one (1) week prior to the activity.

7. Unexcused Leave cannot by made up and are subject to other personnel action, even for funerals, and appointments at the Choctaw Health Center, Clinic, etc. Princess pageant sponsors must submit a letter in advance for pageant purposes.

8. Participants are not allowed to work overtime. Participants are expected to work 80 hours on a bi-weekly pay schedule.

9. Per Tribal Personnel Policies, Emergency advance pay will not be allowed during employment.

10. All emergency leave will be approved with proper notification to the supervisor. You will not be paid for the leave.

11. Jobsites changes can not be requested by a participant. It is understood on the application process that the location and supervisory assignment are the sole responsibility of the program.

12. Participants must wear full uniform at all times, unless, waiver is granted by an authorized member of the staff at the Summer Youth Program. All designated community aid workers will receive three sets of uniforms, and are required to wear these uniforms at all times.

13. Dress Code-Your uniform must be clean when reporting to work each day. Uniforms must be worn up around the waist area at all times. No sagging.
14. Youth men are not allowed to wear earrings.
15. If a student fails a grade he/she will not be eligible for the Summer Employment Program of that year.
16. If student attend extended school, he/she must complete and pass the grade and bring in documentation to the YOP office before they can begin work. Also, if a student completes the school in the middle of the week they will not be able to start work with YOP until the following Monday.
17. Participants may not use the phone, unless, he/she is given permission by a member of the staff of the Summer Youth Program. You may use a pay telephone only during your break. Students should not use the computer unless given permission. Students must not go into a website unless instructed by the supervisor.
18. Participants may not use headphones or bring radios to their worksite.
19. No smoking in buildings, vehicles, or project sites.
20. If any student attend academic camps for an extended period (more that 2 weeks) they must abide by the rules set by person(s) sending you to summer camps.
21. If any participants should deliberately damage property of the YOP program or others, that participant will be responsible for paying the damages at any cost.

22 Students wills be evaluated every 2 weeks after employment. Evaluation will be on attendance, work maturity skills, and job satisfactory.

23. Students cannot use cell phones during working hours to make personal phone calls. Cell phones should only be used during break, lunch and extreme emergencies. If it is found to be used during working hour, it will be confiscated until the end of the work day, and/or the participant will be suspended.

24. All participants who are late coming back from lunch will be docked one hour, if this continues you may be suspended for up to five days.

25. No participant will work unless they have received an official notice form the Youth Opportunity Office. If a participant starts work without official notice he/she will not be paid for those hours. NOTE: If any lifeguard works more than forty, (40) hours a week they will not be paid out of our budget for the extra hours.

26. Upward bound participants must complete their term with the upward bound program before working with YOP. Therefore, students will not get paid until actually starting to work under YOP.

27. All students must give written permission for parents or guardians to pick up payroll cheeks.

28. When shoes are given out on a certain date and time and the participant is on a trip or another activity, it is the participant's responsibility to get in touch with the YOP office as soon as possible to request for shoes. You will no longer be able to get a shoe at the end of the summer program.

REMEMBER . . . All your actions have consequences. If you break the rules or don't meet expectations, these

consequences can include suspension (from one to five days), during which time you cannot participate in any activities. Serious violations of the rules can result in immediate termination.

IMMEDIATE SUSPENSION

1. Leaving your worksite without your supervisor's approval.
2. Sexual harassment or conduct.
3. Hickeys, passion or love marks.
4. Gross insubordination.

IMMEDIATE TERMINATION

1. Possession of alcohol and/or drags.
2. Possession of weapons or firearms on the grounds.
3. Fights, threats of violence, verbal abuse or profanity.
4. Signing someone in or out on someone else's time sheet.
5. Stealing, vandalism, or damage to the property of Summer Youth Program or others.
6. Three days no call and no show.

I hereby understand and will follow the rules of the Youth Opportunity Program during my placement. I understand that I can and will be terminated if I do not follow the rules properly.

SIGNATURES OF APPLICANT DATE

SIGNATURES OF PARENT OR GUARDIAN DATE

REVISED 2/03

Appendix J

Excerpt from Dollar General Employee Handbook

First Quarter 2003

matically terminated, unless the employee can provide verifiable evidence, of extenuating circumstances. Please contact your supervisor for guidance.

NOTE: *Qualified absences related to leave under the FMLA or other federal or state law or regulation will not lead to progressive counseling.*

Progressive Counseling

Progressive counseling is used to document unacceptable performance, conduct or attendance issues and to positively reinforce performance improvement. The performance, conduct and attendance standards contribute to the ability to perform effectively and create a positive, equitable and values-driven environment. The appropriate level of progressive counseling is determined by the severity of the attendance, conduct or performance issue.

The purpose of the progressive counseling is to communicate unacceptable performance, conduct or attendance issues and develop an action plan which results in standard or above standard performance, conduct or attendance. However, these procedures are guidelines only and the Company specifically reserves the right to terminate any employee at any time when the Company determines it to be appropriate under the circumstances.

Reasons for Counseling and/or Termination

The disciplinary action that will be taken in a particular case will depend on the circumstances involved, including the severity of the offense, the employee's past record and other related factors. The following are some examples of violations (NOT all-inclusive) for which even the first offense may lead to progressive counseling and/or termination from the Company:

1. Communication policy violations (including SPAM policy)
2. Smoking Policy violations
3. Excessive absences or tardiness
4. Unapproved absence from work
5. Taking unauthorized, extended breaks
6. Walking off the job or leaving your work area during scheduled work hours without authorization
7. Working overtime without authorization
8. Working hours for which you did not clock in or out (working off the clock) or instructing someone to work off the clock
9. Allowing a minor to perform work for the Company
10. Accepting merchandise for time worked
11. Allowing friends, family or any other individuals who are not employees to work
12. Personal use of Company credit card
13. Substandard performance or conduct
14. Parking in unauthorized areas
15. Eating and drinking in unauthorized areas

16. Violation of Personal Appearance and Dress Code Policy
17. Unauthorized personal use of Company telephones
18. Solicitation, distribution or loitering on Company property
19. Gambling on Company property or at Company sponsored events
20. Sexual harassment or any other form of harassment, discrimination or inappropriate conduct
21. Conviction of a felony or other crime which may be detrimental to the interests of the Company
22. Immoral or indecent conduct on Company property or at Company sponsored events
23. Use of profane or abusive language in the workplace, including use of racial, gender, ethnic or religious slurs
24. Willful destruction or theft of your co-worker's or Dollar General's property
25. Unauthorized use or removal of Company property, equipment or information
26. Falsifying Company documents, including time records
27. Fighting on Company property or inciting a fight
28. Failure to report an accident involving yourself or any vehicle or equipment you may be operating
29. Violation of Drug and Alcohol Testing Policy
30. Insubordination, including, but not limited to, failure to follow the reasonable instruction of your supervisor, the failure to submit to tests required

by the Company, or failure or refusal to participate in an internal investigation

31. Failure to control inventory
32. Failure to protect Company assets
33. Release of proprietary information
34. Failure to submit, follow-up or meet Dollar General hiring Criteria related to pre-employment background checks
35. Possession of a weapon (examples include: guns, knives, weapons in your possession or in your vehicle) on Company property or at Company sponsored events
36. Mishandling of Company property or assets (including, but not limited to: borrowing money from the Company, cash shortages, giving keys to unauthorized personnel, deposit shortages, late deposits, etc.)
37. Sleeping or loafing on the job
38. Creating a hostile work environment
39, Failure to properly ring and/or record all sales through the register
40. Unauthorized personal use of cellular phones and/or pagers during work hours
41. Willfully and deliberately clocking in or out for another employee
42. Driving on behalf of the Company without a valid driver's license
43. Having in your possession or being under the influence of alcohol or illegal drugs in the workplace
44. Violation of the Personal Relationship Policy

45. Posting proprietary information or making derogatory comments regarding Dollar General on message boards or other public sites
46. Failure to cooperate with a police investigation involving the Company
47. Solicitation when either the employee soliciting or being solicited is supposed to be working (work time)
48. Distribution of any non-Company literature or written material in a work area or during work time
49. Providing false or misleading information, pursuant to a Company investigation or inquiry
50. Stealing merchandise or money from the Company (Dollar General prosecutes employees caught stealing from the Company)
51. Violation of the Employee Check Policy
52. Allowing non-Dollar General employees in the store before or after store hours
53. Failure to open the store on time or closing the store early

Employment of Relatives

Working with "close relatives" may lead to a number of awkward situations that work to the disadvantage of both the employee and the Company. Therefore, Dollar General has established the following policy:

* * * *

- Harassment on the basis of any protected characteristic is also strictly prohibited. Under this policy, harassment is speaking to or treating an employee in a way that is degrading or in a way that exhibits

dislike for, hostility or hatred toward, an individual (or that of his/her relatives, friends or associates) because of race, color, religion, sex (including pregnancy, child birth and related conditions), national origin, age, disability, citizenship or any other characteristic protected by law.

Sexual Harassment

- Sexual harassment in any situation is strictly prohibited. This includes sexual harassment by managers, supervisors, co-workers, or third parties such as vendors or customers. It is particularly damaging when it exploits the interdependence and trust between employees or between supervisors and their employees.
- An individual found to be guilty of sexual harassment, creating a hostile work environment or any other form of discrimination is subject to disciplinary action for violations of this policy, up to and including termination from the Company. Accordingly, it is the Company's intention that this policy go beyond the legal requirements and includes conduct we otherwise believe to be inappropriate.

Non-employees of Dollar General

Dollar General applies its Anti-Discrimination and Harassment Policy to its vendors and customers. Dollar General will not tolerate unlawful discrimination by or against non-employees of Dollar General, Dollar General will provide reasonable accommodation for its disabled customers as required by law (e.g., allowing disabled customers to shop with service animals).

Retaliation

Dollar General prohibits retaliation against an employee who has made a report of alleged discrimination or

harassment or who has participated in certain, investigations or administrative proceedings.

Examples of conduct prohibited by this policy include, but are not limited to:

- Offering or implying an employment related reward (such as a promotion or raise) in exchange for sexual favors or submission to sexual conduct
- Threatening or taking of a negative employment action (such as termination, demotion, or denial of a leave of absence) if sexual conduct is rejected
- Unwelcome sexual advances or repeated flirtations
- Unwelcome intentional touching of another person or other unwanted intentional physical contact (including patting, pinching, or brushing against another person's body)
- Unwelcome whistling, staring, or leering at another person
- Asking unwelcome questions or making unwelcome comments about other person's sexual activities, dating, personal or intimate relationships, or appearance
- Unwelcome sexually suggestive or flirtatious gifts, letters, notes, e-mail, or voicemail
- Conduct or remarks that are sexually suggestive or that demean or show dislike for a person or class of persons because of gender (including jokes, pranks, teasing, obscenities, obscene or rude gestures or noises, slurs, epithets, taunts, negative stereotyping, threats, blocking of physical movement)
- Displaying or circulating pictures, objects, or written materials (including graffiti, cartoons, photographs, pinups, calendars, magazines, figurines or

novelty items) that are sexually suggestive or that demean or show hostility to a person because of a protected characteristic

These guidelines also apply to other forms of unlawful harassment, including conduct based on race, national origin, etc.

Reporting Harassment and Discrimination

- Any employee who believes that he/she has been the subject of any form of harassment or discrimination by anyone at Dollar General or by any person who does business with Dollar General or who has witnessed harassment, discrimination or retaliation should immediately report the matter to the Employee Response Center (ERC), at 1-888-237-4114.
- In all cases, an investigation will be conducted. The investigation will be conducted on a confidential basis; sensitive information will be disclosed on a need to-know basis. There will be no retaliation against any employee who reports such conduct or participates in the investigation in good faith. Any attempt to interfere with an investigation or retaliate against an employee for reporting conduct or participation in an investigation will result in immediate termination.

Solicitation and Distribution

In order to avoid interruption of your work and to protect you from unnecessary annoyance, soliciting memberships or contributions, distributing printed material, or conducting personal business on Company property is limited by the following rules:

- Employees must not solicit and/or distribute literature to fellow co-workers during work or while

in working areas. (This restriction does not apply to periods such as breaks and meal times when employees are not required to be working.)

- Soliciting an employee or distributing literature to an employee by a non-employee is prohibited at all times on Company property.
- Soliciting and/or distributing literature to customers is strictly prohibited.
- Only Company sponsored documents are allowed to be posted on Company property.

Bulletin Board Policy

We communicate important information about work and your job on bulletin boards. Please review them frequently to keep up with current activities and information. The bulletin boards are for Company information only. Please do not post or remove any material from them.

Workplace Violence Policy

Dollar General can best perform its mission when all employees coexist in a climate that supports a free exchange of ideas and utilizes constructive methods of conflict resolution. Dollar General is committed to creating and maintaining an environment free from disruptive, threatening and violent behavior.

Dollar General will not ignore, condone or tolerate disruptive, threatening, or violent behavior by any Dollar General employee, contract service provider, visitor or customer. Employees engaged in such behavior will be subject to disciplinary action, up to and including termination. Some disruptive, threatening, or violent behavior is prohibited under criminal or civil law. When appropriate, Dollar General will refer cases for civil action or criminal prosecution.

Definitions

- Workplace Violence: Any physical assault, threatening behavior, verbal abuse or intimidation occurring in the work environment.
- Disruptive Behavior: Disturbs, interferes with, or prevents normal work functions or activities.
- Threatening Behavior: Includes any physical actions short of actual contact (e.g., moving closer aggressively or blocking a person's movement), general oral or written threats to people or property.
- Violent Behavior: Includes any physical assault with or without weapons; behavior that a reasonable person would interpret as being violent (e.g., throwing things, pounding on furniture, slamming doors, destroying property); and specific threats to inflict physical harm (e.g., a threat to harm a named victim).

Examples of Prohibited Conduct: (not all inclusive)

- Yelling, shouting, using profanity or other verbal abuse
- Waving arms, shaking fists or other inappropriate gestures
- Refusing a reasonable request for identification
- Aggressive posturing or movement, inappropriate invasion of someone's personal space
- Preventing the free movement of another person, preventing them from leaving a room
- Any direct or indirect threats toward a person or property
- Throwing objects, slamming doors or telephones, pounding desks; any destruction of property

- Aggressive physical contact, grabbing, touching, holding, shoving or hitting
- Possession of a firearm or other weapon on the premises
- Threatening or implying possession or access to a firearm or other weapon on the premises
- Threatening to return with a weapon at a later date or time

Reporting

All managers and supervisors are responsible for the implementation of this policy. Employees can report such behavior by utilizing the Company's Open Door policy, contacting your Store or Area Manager or by calling the Employee Response Center (ERC) at 1-888-237-4114.

Protective Orders

Employees of Dollar General who have obtained a protective order and wish not to be contacted by a non-employee should supply a copy to the appropriate manager. Other parties may be informed when deemed necessary for safety reasons; however, disclosure will be limited to those individuals who have a legitimate need to know the information. Also supply a copy of the protective order to your Area Manager and local Police Department.

Background Checks

A criminal background check is required for all employees who accept a conditional employment offer for a full time, part time, or temporary position. The purpose of the background check is to provide a safe place for our employees and customers. Receiving a favorable result on the background check, as set forth in Dollar General hiring criteria, is a condition of employment.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 31 2015
OFFICE OF THE CLERK

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that Dollar General Corporation has no parent company and no publicly traded company owns 10% or more of its stock. Dolgencorp, LLC is a wholly owned subsidiary of Dollar General Corporation.

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BRIEF FOR THE PETITIONERS

Petitioners Dollar General Corp. and Dolgencorp, LLC, respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1-36) is published at 746 F.3d 167. The dissent from denial of rehearing en banc (Pet. App. 92-94) is published at 746 F.3d 588. The district court's opinion (Pet. App. 39-54) is published at 846 F. Supp. 2d 646. A prior decision of the district court denying temporary injunctive relief (Pet. App. 55-74) is unpublished.

The opinion of the Supreme Court of the Mississippi Band of Choctaw Indians (Pet. App. 75-91) is unpublished. The order of the District Court of the Mississippi Band of Choctaw Indians was oral and not transcribed.

JURISDICTION

The judgment of the court of appeals was initially entered on October 3, 2013. Pet. App. 1. A timely petition for rehearing was filed on October 17, 2013. The court of appeals denied petitioners' timely petition for rehearing en banc, issued a revised opinion, and re-entered judgment on March 14, 2014. Pet. App. 1-2, 92. Petitioners filed a timely petition for a writ of certiorari on June 12, 2014. This Court granted the petition on June 15, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no relevant constitutional or statutory provisions in this case.

STATEMENT OF THE CASE

Indian "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," absent express congressional authorization. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). This Court thus has held that tribal courts cannot hear *criminal* cases against nonmembers absent specific authorization from Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). This case presents the question whether and when a tribe may nonetheless subject nonmembers to *civil* suit in tribal court for millions of dollars in punitive and other damages on the basis of unwritten tribal tort law.

I. Background On Tribal Courts

The Court's decisions regarding tribal court jurisdiction have turned in significant part on the special nature and history of tribal justice systems. *See, e.g.*, *Oliphant*, 435 U.S. at 196; *Duro v. Reina*, 495 U.S. 676, 693 (1990). As the Bureau of Indian Affairs has noted, "few Indian tribes had operating judicial systems in place in the late 1970's."[1] Even as

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[1] *Court of Indian Offenses*, U.S. Dep't Interior, Indian Affairs, http://www.bia.gov/WhoWeAre/RegionalOffices/SouthernPlains/WeAre/ciospr/index.htm (last visited Aug. 29, 2015).

late as 2002, less than sixty percent of tribes surveyed by the Federal Bureau of Justice Statistics reported having any kind of court system.[2] Instead, until very recently, most tribes relied on traditional methods of dispute resolution that varied significantly among tribes and differed substantially from state and federal legal systems. *See generally, e.g.*, *Oliphant*, 435 U.S. at 191, 196-97; Eric K. Gross, *Evaluation/Assessment of Navajo Peacemaking*, No. 187675 (1999).[3]

Today, the existence, nature, and development of tribal courts remain varied. Some larger tribes have sophisticated legal systems similar to those found in many states. But most are small, working with limited resources.[4] In 2000, the average tribal

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[2] Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, NCJ 205332, at iii (2005) (hereinafter "*Census of Tribal Justice Agencies*"). The exact percentage of tribes with court systems is unclear. *Compare, e.g.*, *id.*, *with* ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 120 (2012) ("[M]ore than half of the 565 federally recognized tribes in the United States do not even have courts.").

[3] *Available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf.

[4] *See* Alaska Legal Servs. Corp., *2011-2012 Alaska Tribal Court Survey Report* 4 (2012) (hereinafter "*Alaska Tribal Court Survey*"), *available at* https://www.tribalcourtsurvey.org/_files/2011-2012AlaskaTribalCourtSurveyReport.pdf (of tribes responding to survey question, "[n]early 40%" reported "a budget of $0 for their court system, with all the work being done by part-time volunteers"); Am. Indian Law Ctr., Inc., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final*

courts system had a single full-time judge.[5] Many tribal judges lack legal training.[6] In 2005, more than forty percent of tribes had no appellate courts.[7]

The independence of tribal judiciaries varies as well. *See Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring); *Duro*, 495 U.S. at 693. "Many tribes still operate under the BIA-drafted constitutions of the 1930s that vested tribal councils with executive power – line authority, with the power to hire and fire – over all reservation entities, including the courts." CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 290 (2005). Indeed, in some tribes the tribal council *is* the tribal court.[8] The lack of judicial independence

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Report 28 (2000) (hereinafter "*Survey of Tribal Justice Systems*").

[5] *Survey of Tribal Justice Systems*, *supra*, at 28.

[6] *See, e.g.*, Justin B. Richland, *"What Are You Going to Do with the Village's Knowledge?" Talking Tradition, Talking Law in Hopi Tribal Court*, 39 L. & SOC'Y REV. 235, 243 (2005) (hereinafter "*Talking Tradition*"); Neil Nesheim, Nat'l Ctr. for State Courts, Inst. for Court Mgmt., *Evaluating Restorative Justice in Alaska: The Kake Circle* 11 (2010), *available at* http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2010/Evaluating%20Restorative%20Justice%20in%20Alaska-The%20Kake%20Circle.ashx (finding that of the "53 magistrates in Alaska, more than 40% are *not* law trained") (emphasis in original).

[7] *See Census of Tribal Justice Agencies*, *supra*, at 20 (only fifty-eight percent of tribal court systems reported having some kind of appellate process in 2005)

[8] *See, e.g.*, *Alaska Tribal Court Survey*, *supra*, at 3 (of tribes responding to survey, "[e]ighteen Tribes indicated that their tribal council also serves as the tribal court, while twenty-one

has sometimes led to political interference with tribal justice.[9]

Tribal court procedures also vary from tribe to tribe and often depart significantly from the procedures practiced in state and federal courts.[10] For that reason, it is significant that most of the federal Constitution does not apply to tribes or their judicial systems. *See Duro*, 495 U.S. at 693; *Talton v. Mayes*, 163 U.S. 376, 384 (1896). And although the Indian Civil Rights Act (ICRA) requires as a matter of statutory law that tribes comply with some constitutional norms – for example, by affording litigants due process, *see* 25 U.S.C. § 1302(a)(8) – its protections are incomplete. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978). Nor is there any easy way for civil defendants to obtain federal redress for violations of ICRA or any other federal right.

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reported having courts as separate bodies"); Max Mizner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 108-09 (2005) (hereinafter "*Treating Tribes Differently*") (noting, for example, that the Pueblo of Laguna has established "a Court of Appeals consisting of the Pueblo Governor and the Six Village Representatives").

[9] Joseph Thomas Flies-Away, Carrie Garrow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 122 (Miriam Jorgensen ed., 2007) ("A common scenario among some nations is that elected officials repeatedly meddle in court cases (overturning decisions, firing judges, or cutting off the court's finances) . . . .").

[10] *See, e.g.*, Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 Current Anthropology 675, 679 (2007).

There is no direct review of tribal supreme court decisions in this or any other federal court. *See Hicks*, 533 U.S. at 385 (Souter, J., concurring) (citing 28 U.S.C. § 1257(a)). Federal habeas review of tribal court judgments is provided only for criminal convictions. 25 U.S.C. § 1303. And there is no private right of action to enforce ICRA against a tribe. *See Santa Clara Pueblo*, 436 U.S. at 52. Moreover, the federal removal statute – which often permits out-of-state defendants sued in state court to remove their cases to the neutral forum of a federal court – does not apply to cases in tribal court. *See Hicks*, 533 U.S. at 368 (citing 28 U.S.C. § 1441).

In many tribal systems, defendants who are not members of the tribe can face distinct disadvantages. Numerous tribes, including the Mississippi Band of Choctaw Indians, require their courts to apply tribal law, custom, and traditions, looking to state law only to fill in gaps in tribal law. *See* Choctaw Tribal Code § 1-1-4; *Talking Tradition*, *supra*, at 243. Those traditions can vary considerably from state or federal legal principles. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008). Accordingly, it is important that outsiders subject to tribal jurisdiction be able to determine the requirements of tribal law. But that is often difficult. *See Hicks*, 533 U.S. at 384-85 (Souter, J., concurring) (noting that the "law applicable in tribal courts is . . . unusually difficult for an outsider to sort out"); *see also* Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*,

106 LAW LIBR. J. 199, 199-200 (2014).[11] Some tribes have detailed written codes, but many rely extensively on unwritten tribal traditions. *See Plains Commerce Bank*, 554 U.S. at 338; *Hicks*, 533 U.S. at 384 (Souter, J., concurring).[12] One survey found that as of 2000, nearly forty percent of tribes had not extensively codified their laws and that forty percent had some unpublished tribal laws or customs applying to non-Indians.[13] Moreover, "a number of important topics, such as environmental regulation, torts, and crimes against children . . . are found in only a minority of codes."[14] While those topics may be addressed in tribal court decisions, that case law may be undeveloped in tribal courts that are often only a few decades old. And, in any event, many tribal courts do not publish their opinions.[15]

As a result, the content of tribal law is often knowable only to a few tribe members, as reflected in the fact that some tribal codes, including the Choctaw's, authorize courts to seek advice from tribal elders to determine the relevant requirements of

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[11] *Available at* http://www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-106/no-2/2014-11.pdf.

[12] *See also Treating Tribes Differently*, *supra*, at 109; *Talking Tradition*, *supra*, at 244.

[13] *Survey of Tribal Justice Systems*, *supra*, at 15, 19.

[14] *Id.* at 19.

[15] *See id.* at 26 (more than a quarter of tribes do not make their judicial decisions accessible to nonmembers).

tribal law in particular cases. *See* Choctaw Tribal Code § 1-1-4.[16]

Nonmembers also tend to face juries composed of individuals from a tribe to which the plaintiff belongs, but the defendant does not. Indeed, some tribes have traditionally excluded nonmembers from their civil jury pools. *See, e.g.*, *Oliphant*, 435 U.S. at 194 & n.4; Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 215 (2007); Saginaw Chippewa Tribal Law, tit. III, § 3.903; Ute Indian Law and Order Code § 1-6-1(2). In small communities, it also may be difficult to find jurors who are not related to, or at least acquainted with, the plaintiff. And it is often not possible to afford defendants a change of venue to avoid a proven risk of bias, because there are no other venues.[17]

Nonmembers' status as outsiders thus can give rise to a substantial risk of unfair treatment. *See, e.g.*, Larry Nesper, *Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe*, 48 CURRENT ANTHROPOLOGY 675, 682 (2007) (reporting that in one tribe "tribe members working as lay advocates . . .

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[16] *See also, e.g.*, Hoopah Valley Tribal Code tit. II, ch. 1, § 2.1.05; Blackfeet Tribal Law & Order Code ch. 2, § 2; Coushatta Tribe of La. Judicial Codes tit. IX, § 1; Chickasaw Nation Code tit. 5, § 5-102.7; Pawnee Tribe of Oklahoma Code tit. I, § 8.

[17] By petitioners' count, there are at least 100 tribal court systems that list only a single venue on the tribe's or the tribal court's website.

often seek to foreground political dimensions of the regulatory regime by explicitly identifying with their clients as fellow tribe members"); *see also Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001) (refusing to enforce $2 million tribal court judgment against nonmember due to plaintiffs' "appeal to racial prejudice" during trial). And as the multi-million-dollar claim in this case illustrates, the stakes for nonmembers can be high. *See, e.g.*, *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999) (jury issued $250 million wrongful death award to victim of railroad accident, later reduced by tribal court to $25 million).

The variation in tribal justice systems is unsurprising, as it reflects enormous diversity among tribes themselves. There are 566 federally recognized tribes[18] and 326 reservations.[19] Many of these reservations are less than two square miles.[20] The vast majority of tribes have populations of less than 10,000 people.[21] It may be difficult for a tribe with a few thousand members to run a justice system on par with a state or the federal government.

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[18] *See* 80 Fed. Reg. 1942 (Jan. 14, 2015).

[19] *See Frequently Asked Questions*, U.S. Dep't Interior, Indian Affairs, http://www.bia.gov/FAQs/ (last visited Aug. 29, 2015).

[20] *See id.*

[21] Office of Assistant Secretary – Indian Affairs, U.S. Dep't Interior, *2013 American Indian Population and Labor Force Report* 24 tbl.4 (2014), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf.

II. Factual And Procedural Background

The recent and varied development of tribal justice systems is one of the reasons this Court has repeatedly held that tribes lack the power to subject nonmembers to trial in tribal court for criminal offenses. *See Duro v. Reina*, 495 U.S. 676, 694 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-197 (1978). The Fifth Circuit in this case nonetheless held that all tribes – big and small, with sophisticated or simple justice systems – have (and, indeed, have always had) the inherent authority to subject nonmembers to tort suit in tribal court, even for millions of dollars in punitive damages, so long as the tort arises from some sort of consensual relationship with a tribe or its members.

A. Factual Background

Petitioner Dolgencorp, LLC operates a retail store selling basic household merchandise and consumable goods at the Town Center on the reservation of the Mississippi Band of Choctaw Indians. Pet. App. 2. It leases the store space from the Tribe. *Id.* In 2003, Dale Townsend was employed as the store manager. *Id.* All Dollar General employees are required to comply with a code of conduct that prohibits, among other things, sexual harassment and workplace assaults. *See* J.A. 86-90.

The Tribe operates a job training program, known as the Youth Opportunity Program (YOP), which places young tribal members in short-term positions with local businesses for educational purposes. Pet. App. 2-3. Businesses participating in the program benefited by receiving up to six weeks of temporary labor by the youths paid for by the Tribe.

Id. 5. While the Tribe requires the young tribe members and their parents to sign a contract acknowledging program rules, J.A. 77-81, businesses participating in the program are not given any contract or provided any specific rules that govern their participation in the program, *see* Pet. App. 86 (any agreement between Tribe and businesses was "unwritten"). As a tribal representative later admitted in the federal district court proceedings, the program was not essential to the financial viability of the tribe or government relations. J.A. 68.

In the spring of 2003, Townsend agreed to permit a YOP placement at the Dollar General store. Pet. App. 3. That decision was in direct violation of Dollar General's written policies that forbid employment of minors in Dollar General stores, and would have been grounds for termination had Dollar General been aware of it. J.A. 83.

Respondent John Doe is a member of the Mississippi Band of Choctaw Indians and was a participant in the YOP. Pet. App. 3. The YOP assigned Doe to the Dollar General store. *Id.* Doe alleges that in July 2003, during his assignment at the store, Townsend sexually assaulted him. *Id.* Upon learning of the allegations, the Tribe permanently expelled Townsend from the reservation. *See* Pet. App. 57, 77-78.

B. Proceedings In The Tribal Court

Although Doe could have brought claims in state court,[22] his family chose instead to pursue litigation in the courts of his tribe. In January 2005, the Does sued Townsend and petitioners in Choctaw tribal court, alleging that petitioners were vicariously liable for Townsend's criminal conduct, or were negligent in his hiring, training, and supervision. Pet. App. 3. The Complaint demanded "actual and punitive damages in a sum not less than 2.5 million dollars." *Id.*

The defendants moved to dismiss on the ground that the tribal court lacked jurisdiction. Pet. App. 3. The tribal district court denied the motions in an unwritten ruling. *Id.* In August 2005, the defendants filed a Petition for Permission to Appeal with the Supreme Court of the Choctaw Tribal Court. *Id.* On February 8, 2008, the Choctaw Supreme Court allowed the appeals and in the same order affirmed the exercise of jurisdiction. *Id.* at 75-91.

C. Proceedings In The District Court

On March 10, 2008, petitioners and Townsend filed suit in the District Court for the Southern District of Mississippi, seeking to enjoin the litigation in tribal court. Pet. App. 4.[23] The district court

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[22] *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

[23] Federal courts may consider collateral challenges to tribal court proceedings and enjoin litigation over which the tribal court lacks jurisdiction, so long as the jurisdictional objections are first exhausted through the tribal courts. *See*

granted summary judgment in respondents' favor in relevant part. *Id.* 37-38.

The court recognized that under *Montana v. United States*, 450 U.S. 544, 565 (1981), "and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians." Pet. App. 42 (citing *Montana*, 450 U.S. at 565). But the court held that by agreeing to provide a position for Doe at its store, petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* 46. At the same time, the court held that the tribal courts had no jurisdiction over Townsend, the actual alleged perpetrator, because, in the court's view, Townsend did not have a sufficient consensual relationship with Doe or the Tribe. *Id.* 71-73.

D. Court of Appeals Ruling

1. A divided panel of the Fifth Circuit affirmed. Pet. App. 1-2. The panel presumed that when "tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Id.* 10 (citation and quotation marks omitted). So it viewed the jurisdictional question as whether Doe's tort claims fell within the legislative jurisdiction of the Tribe. *Id.* The panel explained that "*Montana* and its progeny provide two exceptions to the general rule that Indian tribes cannot exercise civil [legislative] jurisdiction over

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Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.3 (1985).

non-members." *Id.* 4 n.1. "The first *Montana* exception, also known as the consensual relationship exception, provides that a tribe may regulate conduct that has a nexus to some consensual relationship between the non-member and the tribe or its members." *Id.*

The panel then held that by agreeing to take on Doe as an intern, petitioners engaged in a "consensual relationship" with a tribe or tribe member within the meaning of the first *Montana* exception. *Id.* 12.[24] The panel further held that because of that consensual relationship, petitioners were subject to tribal court jurisdiction for tort claims for the harm Doe suffered "in the course of his employment." *Id.* 13-14. Accordingly, the panel held, all that is required to subject nonmembers to tort claims in tribal court is a "logical nexus" between the activity giving rise to the tort claim and "some consensual relationship between a business and the tribe or its members." *Id.* 17.

Judge Smith dissented. He noted that under *Oliphant*, "store manager Townsend could not have been criminally prosecuted in tribal court for the alleged molestation of John Doe." *Id.* 23. "Although

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[24] Respondents did not claim that the second *Montana* exception – which allows tribes to regulate conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" – applied. Pet. App. 10 n.2 (quoting *Montana*, 450 U.S. at 566); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (conduct falling within second exception "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.") (citation omitted).

the Supreme Court has not yet explicitly adopted an *Oliphant*-like rule for civil cases, it has 'never held that a tribal court had jurisdiction over a nonmember defendant.'" *Id.* 24 (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001)).

In Judge Smith's view, because the relationship between petitioners and Doe had no impact on tribal self-government or internal relations, it could not form the basis for the application of *Montana*'s consensual relationship exception. Pet. App. 23-28. But even if the consensual relationship exception applied, the dissent concluded, petitioners' participation in the tribal job training program did not carry implicit consent to be subject to the jurisdiction of the tribal court for "any and all tort claims actionable under tribal law" arising from Doe's internship. *Id.* 31. Judge Smith noted that the "elements of Doe's claims under Indian tribal law are unknown to [petitioners] and may very well be undiscoverable by it," given that tribal law includes unwritten "customs . . . and usages of the tribes" that trump state common law. *Id.* 30 (ellipsis in original) (quoting Choctaw Tribal Code § 1-1-4) (internal quotation marks omitted). This is in stark contrast to the type of regulation encompassed by the first *Montana* exception, which "envisages discrete regulations consented to *ex ante*." *Id.* 32.

2. The court of appeals denied rehearing en banc over the dissent of five judges.

3. This Court granted certiorari.

SUMMARY OF ARGUMENT

Tribal courts lack civil jurisdiction over nonmembers absent congressional authorization (*e.g.*, in a statute or treaty) or the defendant's unambiguous consent (*e.g.*, in a forum selection clause of a contract). This is so for two independent reasons.

I. First, the same treaties, history, and considerations of the United States' overriding sovereignty that led this Court to conclude that tribal courts lack *criminal* jurisdiction over nonmembers in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), make clear that tribes likewise have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court.

Incorporation-era treaties contemplated that *all* disputes between tribal members and United States citizens would be resolved through appeal to the Federal Government, which often agreed to provide the equivalent of civil relief to injured tribe members. Congress evinced the same understanding, both in the legislation it enacted (*e.g.*, giving territorial courts civil jurisdiction over disputes between Indians and non-Indians) and the legislation it did not enact (*e.g.*, failing to provide this Court jurisdiction to review the decisions of tribal courts or to provide citizens a means to remove cases from tribal courts to federal court). Surveying this legal landscape in 1891, this Court explained that the "general object of these statutes is to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction

of all actions to which its own citizens are parties on either side." *In re Mayfield*, 141 U.S. 107, 116 (1891).

Even setting this history aside, tribal court jurisdiction over nonmembers is fundamentally incompatible with the United States' "overriding sovereignty." *Oliphant*, 435 U.S. at 209. In *Oliphant*, this Court held that criminal jurisdiction over nonmembers was inconsistent with the United States' territorial sovereignty because it permitted citizens to be tried by an authority existing outside the constitutional structure and unconstrained by the provisions of the Constitution designed to protect citizens' liberty. The same is true of civil claims, which implicate the Constitution's equally important concern that citizens not be arbitrarily deprived of their property.

Accordingly, Congress, not this Court, is the appropriate body to decide whether, when, and under what conditions tribal courts may exercise civil jurisdiction over nonmembers. But even absent congressional action, tribes retain their traditional power to exclude outsiders, including for violation of tribal laws. Injured tribe members may bring claims in state, and sometimes federal, court. And tribal courts can exercise civil jurisdiction over nonmembers if the defendant unambiguously consents to it (for example, through a forum selection clause in a mineral lease).

II. In the past, this Court has avoided the question whether a tribe may ever subject nonmembers to civil suit in tribal court by concluding that the conduct at issue was not even subject to tribal regulation, and holding that tribal courts may not adjudicate claims regarding conduct tribes cannot

regulate. The Court could do so again in this case. In *Montana v. United States*, 450 U.S. 544 (1981), this Court held that tribes generally lack legislative authority over nonmembers, subject to two narrow exceptions. Respondents have abandoned any claim that this case falls under the second exception, and it does not fall under the first.

The first *Montana* exception allows tribal regulation, "*through taxation, licensing, or other means*, [of] the activities of nonmembers who *enter consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). Regulation through tort litigation in tribal court is not an "other means" within the contemplation of this exception. The exception's premise is that nonmembers have manifested consent to tribal regulation through their conduct. But knowing consent to tribal rules is impossible when the regulation takes the form of civil suits in which tribal juries decide the meaning of unwritten tort law, the content of which is often impossible for nonmembers to determine in advance.

Moreover, because tort law regulates such a broad swath of human conduct, allowing its application to nonmembers would effectively permit the first *Montana* exception to swallow the general rule that tribes have lost the right to pervasively regulate nonmember conduct on tribal land. And it would permit regulation of conduct that has, at most, a tangential relationship to the core purpose of the *Montana* exceptions, which is to protect the "tribe's sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling

internal relations." *Plains Commerce Bank*, 554 U.S. at 334 (citations and internal punctuation omitted).

ARGUMENT

This Court has repeatedly held that tribes generally lack regulatory authority over nonmembers, and that even the limited laws that may be applied to outsiders cannot be enforced through criminal prosecutions in tribal court. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Accordingly, there is no question that the Tribe in this case lacked jurisdiction to impose even a dollar in criminal fines on the nonmember alleged to have assaulted plaintiff Doe in Dollar General's store. The tribal court nonetheless claimed the power to levy millions of dollars in punitive damages against Dollar General as punishment for its alleged violations of unwritten tribal tort law that imposes vicarious and other forms of liability on nonmember companies for the on-reservation crimes of their employees.

The Fifth Circuit erred in upholding that assertion of tribal court jurisdiction, for two independent reasons. First, tribal courts lack jurisdiction over nonmembers in civil as well as criminal cases, absent the defendant's unambiguous consent (*e.g.*, in a forum selection clause) or congressional authorization (*e.g.*, in a statute or treaty). Although this limitation should apply to all civil suits in tribal court, this Court can resolve this case more narrowly by holding that tribal courts lack such jurisdiction at least over tort claims. Second, at the very least, tribes' civil adjudicative jurisdiction

extends no further than their legislative authority. And in this case, the Tribe lacks authority to apply its unwritten tort law to petitioners as a means of regulating any consensual relationship petitioners may have with the Tribe or its members.

I. Tribes Generally May Not Exercise Legislative Or Adjudicative Authority Over Nonmembers Absent Congressional Authorization.

Upon incorporation into the United States, tribes became subject to plenary federal control. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As a consequence, tribes continue to possess only "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status," *Wheeler*, 435 U.S. at 323, unless Congress specifically delegates or restores such divested powers back to the tribes. This residual inherent tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Tribes thus may tax activities on tribal land, determine tribal membership, regulate domestic relations among members, and "exclude outsiders from entering tribal land." *Id.* at 327-28. "But tribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . ." *Id.* at 328.

This strict limitation on tribal power over nonmembers extends to exercises of both legislative and adjudicative authority.

Legislative Authority. In *Montana v. United States*, 450 U.S. 544 (1981), this Court addressed the scope of tribes' legislative authority, concluding that "Indian tribes have lost any right of governing every person within their limits except themselves," subject to two narrow exceptions. *Id.* at 565 (citation and internal quotation marks omitted). Under what has become known as the first *Montana* exception, a

> tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. Under the second *Montana* exception, a tribe retains

> inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566.[25]

The exceptions to the rule "are 'limited' ones, and cannot be construed in a manner that would 'swallow

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[25] *Montana*'s general proscription against tribal regulation of nonmember conduct "applies to both Indian and non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Accordingly, "the existence of tribal ownership" of the land on which an activity takes place "is not alone enough to support regulatory jurisdiction over nonmembers." *Id.*

the rule,' or 'severely shrink' it." *Plains Commerce Bank*, 554 U.S. at 330 (citations omitted). Moreover, a tribe's regulation of nonmembers, even under the *Montana* exceptions, "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.*

Adjudicative Authority. The federal Constitution protects liberty and property not only through substantive limits on legislative power, but also through measures designed to assure fair civil and criminal trials throughout the United States. *See, e.g.*, U.S. Const. art. III, §§ 1, 3; *id.* amends. V-VIII, XIV. Given that tribal courts operate outside this constitutional structure, and given the recent and uneven development of tribal justice systems, this Court has considered the question of tribal adjudicative power to be distinct from its legislative jurisdiction. *See Hicks*, 533 U.S. 357-58 & n.2.

Thus, the Court has held that tribes lack any inherent authority to enforce their laws through criminal prosecution of nonmembers in tribal court. *See Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 195 (1978). The Court also has held open the possibility that the same may be true of civil suits. *See Hicks*, 533 U.S. at 358 & n.2. At the very least, the Court has held, a tribal court's civil adjudicative authority extends no further than the tribe's legislative authority. *See Plains Commerce Bank*, 554 U.S. at 330; *Hicks*, 533 U.S. at 357-58; *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In this case, respondents' attempt to subject petitioners to tort claims in tribal court exceeded both the Tribe's adjudicative and legislative jurisdiction.

II. Tribal Courts Lack Adjudicative Jurisdiction Over Nonmembers, Absent Congressional Authorization Or The Unambiguous Consent Of The Defendant.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court held that tribal court criminal jurisdiction over nonmembers is inconsistent with the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts" at the time tribes were incorporated into the United States, *id.* at 206, as well as the "overriding sovereignty" of the United States, *id.* at 209. In the years since, this Court has recognized that tribal court *civil* jurisdiction is "not automatically foreclosed" by *Oliphant*'s holding. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). Instead, the Court has held that determining the "existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56 (footnote omitted). Moreover, the Court has required as a matter of comity that tribal courts generally be allowed to conduct that analysis in the first instance. *Id.* at 856; *see also, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19-20 (1987).

More recently, however, the Court has noted that it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). And it has made clear that its decisions requiring tribal exhaustion do not

"broadly confirm tribal-court civil jurisdiction over claims against nonmembers arising from occurrences on any land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997); *see also Hicks*, 533 U.S. at 358 n.2.

In fact, the analysis this Court has directed tribal courts to conduct with respect to civil jurisdiction leads to the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*.

A. Treaty History Reflects The Expectation That Tribes Would Not Retain Any Authority To Subject Nonmembers To Any Form Of Tribal Justice, Criminal Or Civil.

Deciding the scope of tribes' retained inherent authority must begin with an examination of the treaties, legislation, and other history surrounding to the tribes' incorporation into the United States.

1. In *Oliphant,* the Court thus began by asking whether at the time of incorporation, tribes and the federal government would have understood tribes to retain the right to subject nonmember American citizens to tribal justice. The answer, the Court held, "would have been obvious." 435 U.S. at 210.

To start, "[u]ntil the middle of this century [*i.e.*, the middle of the 1900s] few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197. With respect to those few tribes that did have court systems, from "the earliest treaties . . . it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect." *Id.* Many treaties expressly withheld

that power from the tribes, assigning to the Federal Government responsibility for punishing misconduct by nonmember citizens on tribal lands. *Id.* at 197 n.8. The only exception was a provision in some early treaties under which nonmembers illegally attempting to settle on Indian lands "forfeit the protection of the United States of America" so that "Indians may punish him or not as they please." *Id.* (citation omitted). But that exception proved the rule that tribes generally lacked the power to subject nonmember citizens to tribal justice. *Id.*

Especially pertinent to this case, the Court pointed to the example of "the 1830 Treaty with the Choctaw Indian Tribe, which had one the most sophisticated tribal structures" of the time. *Oliphant*, 435 U.S. at 197. While the treaty guaranteed the Tribe broad powers of self-government, that grant plainly did not include the power to subject American citizens to the tribal justice system: "the Choctaws at the conclusion of this treaty provision 'express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.'" *Id.* at 197 (emphasis in original) (quoting Treaty with the Choctaw, Art. IV, 7 Stat. 333, 334 (1831)). "Such a request for affirmative congressional authority is inconsistent with [any] belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty." *Id.* at 197-98.

2. Nothing in these treaties or their surrounding context suggests that although tribes were stripped of their power to subject nonmember citizens to *criminal* adjudication, they retained the authority to

subject to them civil trials, including trials exposing them to tort claims and quasi-criminal measures like punitive damages.

To be sure, the treaties generally did not specifically address civil (as opposed to criminal) jurisdiction in terms, but that undoubtedly reflects that most tribes did not have court systems, much less court systems that distinguished between civil and criminal matters in the Anglo-American style. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 144 (2d ed. 2010) ("There was, in short, no distinction between tribal criminal and civil jurisdiction."). Tribal justice mixed the essential components of both civil and criminal law, often focusing more heavily on compensation to the injured than American criminal law. *See id.* Accordingly, in denying tribes the power to punish nonmember citizens for violating tribal law, the treaties necessarily contemplated that citizens would thereby be insulated from *any* exposure to the tribal justice system. Certainly, no treaty of which petitioners are aware (and certainly none with the Choctaw) expressly granted tribes the authority to subject American citizens to civil suits or any other form of tribal justice.

Any claim that the treaties implicitly granted tribes civil jurisdiction over citizens is belied by numerous features of the agreements. For one thing, some treaties – including a treaty with the Choctaw – "specifically granted the right of self-government to the tribes [but] specifically excluded jurisdiction over nonmembers." *Hicks*, 533 U.S. at 382 (Souter, J., concurring) (citing, *e.g.*, Treaty with the Choctaw and Chickasaw, Art. 7, 11 Stat. 611, 612 (1855)) (other

citations omitted); *see also, e.g.*, 2 Op. Att'y Gen. 693, 695 (1834) (concluding that it was "very certain" that American citizens "were not amenable to the laws or courts of the Choctaw nation");[26] Treaty with the Creeks and Seminoles, Art. XV, 11 Stat. 699, 704 (1856) (tribe would be "secured in the unrestricted right of self-government . . . *excepting, however*, all white persons, with their property, who are not, by adoption or otherwise, members" of the tribe) (emphasis added). Obviously, subjecting nonmembers to tribal court jurisdiction for civil claims would have been inconsistent with these limitations.

Instead, the treaties contemplated that the Federal Government would resolve all aspects of any disputes between tribes and American citizens. The 1830 treaty with the Choctaw is typical. It provides that all "acts of violence committed upon persons and property of the people of the Choctaw Nation either by citizens of the U.S. or neighboring Tribes" would be "referred to some authorized Agent by him to be referred to the President of the U.S. who shall examine into such cases and see that every possible degree of justice is done to said Indian party of the Choctaw Nation." Treaty with the Choctaw, Art. VII, 7 Stat. 333, 334 (1831); *see also, e.g.*, Treaty with the

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[26] In an 1855 opinion, the Attorney General concluded that Choctaw courts could exercise civil jurisdiction "over such white men as of their own free will and accord choose to become members of the nation." 7 Op. Att'y Gen. 174, 185 (1855). But he expressly declined to extend that conclusion to persons "trading with the Indians, or sojourning among them." *Id.* at 186.

Apaches, Art. 4, 10 Stat. 979, 979 (1852) (requiring tribe to "refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment").[27] In other treaties, the Government went further and specifically agreed to provide indemnification for certain injuries suffered by Indians at the hands of citizens, affording a remedy akin to civil tort damages. *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 563 (1883) (quoting terms of treaty with the Sioux); Treaty with the Choctaw and Chickasaw, Art. 14, 11 Stat. 611 (1855) (providing that "full indemnity is hereby guaranteed to the party or parties injured"); Treaty with the Creeks and Seminoles, Art. 18, 11 Stat. 699 (1856) (same).[28]

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[27] *See also, e.g.*; Treaty with the Rikara, Art. 6, 7 Stat. 259, 260 (1825) (same); Treaty with the Cheyenne, Art. 5, 7 Stat. 255, 256 (1825) (same); Treaty with the Sioune and Ogallala, Art. 5, 7 Stat. 252, 253 (1825) (same). Conversely, treaties provided that if any "Choctaw . . . commit[s] acts of violence upon the person or property of a citizen of the U.S.," the "person so offending shall be delivered up to an officer of the U.S." so that the offender "may be punished as may be provided in such cases, by the laws of the U.S." Treaty with the Choctaw, Art. VI, 7 Stat. 333, 334 (1831).

[28] *See also, e.g.*, Treaty with the Rikara, Art. 6, 7 Stat. 259, 260 (1825); Treaty with the Sac and Foxes, Art. 4, 7 Stat. 84, 85 (1804); Treaty with the Osages, Art. 9, 7 Stat. 107, 109 (1808); Treaty with the Quapaws, Art. 6, 7 Stat. 176, 178 (1818); Treaty with the Kiowa and Comanche, Art. I, 15 Stat. 581, 582 (1867); Treaty with the Cheyenne and Arapahoe, Art. I, 15 Stat. 593, 593 (1867); Treaty with the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute, Art. VI, 15 Stat. 619, 620 (1868); Treaty with the Sioux, Art. I, 15 Stat. 635, 635 (1868); Treaty with the Crow, Art. I, 15 Stat.

Accordingly, the treaties reflected an understanding that tort-like claims against nonmembers would be resolved by petitioning the Federal Government for relief, not by subjecting nonmembers to tribal courts. Consistent with that understanding, widespread tribal assertion of civil jurisdiction over nonmembers is a recent phenomenon. While the lack of reliable, accessible records of tribal proceedings makes it impossible to say with certainty when the first such assertions of jurisdiction took place, petitioners have found no discussion of such cases in the federal reporters prior to the 1960s. *See United States ex. rel Rollingson v. Blackfeet Tribal Court of the Blackfeet Indian Reservation*, 244 F. Supp. 474 (D. Mont. 1965); *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975); *cf. Oliphant*, 435 U.S. at 197 (noting that attempted exercises of "criminal jurisdiction over non-Indians . . . is a relatively new phenomenon," seemingly also arising in the middle of the twentieth century); *Alberty v. United States*, 162 U.S. 499, 501 (1896) (noting that at the end of the nineteenth century, the Cherokee Nation disavowed any civil or criminal jurisdiction over even nonmembers who married citizens of the Nation).

This is not to say that the treaties deprived tribes of all power over nonmembers. The treaties acknowledged, for example, tribes' right to exclude

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649, 649 (1868); Treaty with the Northern Cheyenne and Northern Arapahoe, Art. I, 15 Stat. 655, 655 (1868); Treaty with the Navajo, Art. I, 15 Stat. 667, 667 (1868); Treaty with the Shoshonees and Bannacks, Art. I, 15 Stat. 673, 673 (1868).

nonmembers from their lands. *See, e.g.*, Treaty with the Choctaw, Art. XII, 7 Stat. 333, 335 (1831). And this included some power to license and tax those permitted onto tribal territory (although the right was sometimes made subject to approval by federal officials). *See, e.g.*, Treaty with the Choctaw and Chickasaw, Art. 16, 11 Stat. 611, 615 (1855). But the remedy for violation of such conditions on entry was exclusion from the reservation or appeal to the Federal Government for relief, not subjecting citizen offenders to the tribal justice system. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 182-83, 183 n.37 (1982) (Stevens, J., dissenting) (collecting cases); *Morris v. Hitchcock*, 194 U.S. 384, 389-90 (1904); *see also* Pet. App. 57 (explaining that Tribe in this case exercised power to exclude Townsend, the alleged perpetrator, from the reservation).

B. Congress And This Court Evinced The Same Understanding In Incorporation-Era Legislation And Decisions.

1. In *Oliphant*, this Court also looked to legislation and judicial decisions for further evidence of the contemporary understandings of the authority retained by the tribes after their incorporation into the United States. *See* 435 U.S. at 201-02. The Court noted that Congress initially had little reason to address directly the question of tribal court jurisdiction over nonmembers "because of the absence of formal tribal judicial systems." *Id.* at 201. But the Court found support for the proposition that tribes retained no criminal jurisdiction over nonmembers in legislation that extended federal law in various ways to activities on tribal land, consistently carving out only controversies between members of the tribe. *See*

id. at 201-02. The Court noted, for example, that early legislation provided for *federal* jurisdiction over offenses by non-Indians against Indians. *Id.* at 201. Congress also extended federal enclave law to Indian country with the sole exception of "any offense committed by one Indian against another." *Id.* at 201 (Act of Mar. 3, 1817, § 2, 3 Stat. 383, 383 (codified as amended at 18 U.S.C. § 1152)). And even that limited reservation of authority was cut back by the Major Crimes Act of 1855, when Congress federalized certain serious offenses by tribe members even when committed against another member of the tribe. *See id.* at 203 (citing Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153)).

The courts of the era shared the same view of tribal courts' limited jurisdiction over nonmembers. In *In re Mayfield*, 141 U.S. 107 (1891), this Court surveyed "Congress's various actions and inactions," concluding that they "demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts," *Oliphant*, 435 U.S. at 204.

2. There is no basis to conclude that Congress or the courts nonetheless believed that tribes had retained the inherent authority to subject nonmembers to tribal justice so long as the adjudication could be viewed as "civil" instead of "criminal."

a. As in the criminal context, there is a relative dearth of early legislation directly addressing tribal courts' civil jurisdiction (there being few tribal courts and Indian relations generally being addressed through treaties). But the legislation that did exist is consistent with the complete withdrawal of tribal court jurisdiction over nonmembers.

To start, no legislation came close to recognizing the existence of any such tribal authority. To the contrary, in several early statutes governing trade with Indian tribes, Congress provided that if a U.S. citizen took or injured the property of a tribal member, the offender would be tried in federal court and required to pay twice the value of the property to the injured party, with the Federal Government guaranteeing payment of at least the value of the lost property. *See* Act of Mar. 30, 1802, ch. 13, § 4, 2 Stat. 139, 141; Act of June 30, 1834, §16, 4 Stat. 729, 731.

When Congress expressly addressed judicial resolution of civil disputes in Indian country, it conferred jurisdiction on *federal* courts to resolve civil claims between Indians and citizens, providing that the "judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all *civil* and criminal cases arising in the country *in which members of the nation* by nativity or adoption *shall be the only parties.*" Act of May 2, 1890, 26 Stat. 81, 94 (emphasis added).

Likewise, it appears that for more than a century, the Court of Indian Offenses and so-called "CFR" courts (which were established by the Federal Government on reservations lacking tribal court systems) exercised civil jurisdiction over disputes involving nonmembers only if the nonmember consented. *See Hicks*, 533 U.S. at 383 (Souter, J., concurring) (citing 25 C.F.R. § 11.103(a) (2000)).[29]

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[29] With little explanation, the Bureau of Indian Affairs amended the regulations in 2008 to broaden the courts' jurisdiction over non-consenting nonmembers so long as at least

Congress's understanding that tribal courts lacked civil jurisdiction over nonmembers is further reflected in the laws Congress did *not* enact. In some of its earliest legislation, Congress protected out-of-state defendants from unfair disadvantage in the home courts of their adversaries in a variety of ways, but applied none of those protections to tribal courts. For example, Congress afforded this Court appellate jurisdiction over the decisions of state courts of last resort, but not over tribal courts. *See* 28 U.S.C. § 1257(a). Congress further authorized removal of state cases to federal court when the plaintiff and defendant were citizens of different states, but said nothing about removal of cases from tribal courts. *See Hicks*, 533 U.S. at 385 (Souter, J., concurring) (discussing 28 U.S.C. § 1441(a)). And it was not until the 1960s that Congress imposed any requirements on the procedures employed in tribal courts. *See Duro v. Reina*, 495 U.S. 676, 693 (1990). Surely these omissions reflect that Congress had no inkling that citizens of the United States would be subject to courts other than those identified in, and subject to the protections of, the U.S. Constitution.

To the extent it sheds any light on the transformation of tribal sovereignty in the 1700s and 1800s, more recent legislation is in accord.[30] For

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one party to the suit was an Indian. *See* 73 Fed. Reg. 39,859, 39,860 (July 11, 2008) (promulgating 25 C.F.R. § 11.116).

[30] The question of retained inherent jurisdiction requires an examination of the sources of law and common understanding during the era of the tribes' incorporation into the United States. *See Oliphant*, 435 U.S. at 196-206. Recent legislation may shed light on whether Congress has *restored* a

example, consistent with its chipping away at tribal criminal jurisdiction even over tribe members, Congress enacted Public Law Number 280 in 1953 to permit states to assume both criminal and civil jurisdiction over Indian land within the state. *See* Act of Aug. 15, 1953, 67 Stat. 588, 588-589; *Duro*, 495 U.S. at 680 n.1.[31] Moreover, in 1968, Congress imposed substantial restrictions on the operations of tribal governments, including tribal courts, to ensure fair treatment of the tribes' *own members* at the hands of their own governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). Among the limitations in the Indian Civil Rights Act was a sharp curtailment in the power of tribal courts to punish even member-on-member crime. The Act, for example, limited criminal sentences to six months in jail and criminal fines to $500. *See* ICRA § 202(7), 82 Stat. 73, 77 (1968).[32] To impose even those modest sanctions, the statute required tribes to afford their members a laundry list of specific protections, including most of the guarantees of the Bill of Rights. *See* 25 U.S.C. § 1302(a)(3)-(4), (6)-(10), (c).

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sovereign power lost at incorporation, *see United States v. Lara*, 541 U.S. 193, 199 (2004), but has limited relevance to the logically antecedent question of whether the power was retained in the first place, *see Oliphant*, 435 U.S. at 211-12.

[31] Congress subsequently amended the law to require tribes' consent to state assumption of this jurisdiction. *See* Pub. L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79 (codified at 25 U.S.C. § 1322).

[32] The limits were later extended to three years per offense, or a total punishment of nine years per proceeding, and $15,000. *See* 25 U.S.C. § 1302(a)(7), (b).

In comparison, ICRA's relative silence regarding tribal courts' civil jurisdiction can only be read as reflecting Congress's understanding that tribal courts generally lacked jurisdiction over nonmembers – having capped the pecuniary criminal penalties that tribal courts may impose even upon their *own members*, and required strict observance of federally specified procedural guarantees, it is hardly plausible that Congress nonetheless believed that tribal courts would have authority to impose millions of dollars in civil compensatory and punitive damages on *nonmembers*, but failed to provide comparable limits and protections.

b. During the incorporation era, this Court shared the same basic understanding that tribal courts retained jurisdiction, both civil and criminal, only over disputes among members of the tribe. Thus, in 1891 this Court surmised that the

> policy of congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact. . . .

In re Mayfield, 141 U.S. at 115-16. Without distinguishing between civil and criminal adjudications, the Court explained that:

> The general object of these statutes is to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States

> jurisdiction of all actions to which its own citizens are parties on either side.

Id. at 116.

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None of this should be surprising. Even today, subjecting a citizen of the United States, "within our domestic borders, to a sovereignty outside the basic structure" of our Constitution "is a serious step." *Lara*, 541 U.S. at 212 (Kennedy, J., concurring in the judgment). At the very different time of incorporation, it would have been unthinkable. In that era, the federal government viewed "most Indian tribes [as] characterized by a 'want of fixed laws [and] competent tribunals of justice." *Oliphant*, 435 U.S. at 210 (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834)). The systems of tribal justice that did exist were foreign to most Americans and operated unconstrained by the Bill of Rights, the set of restrictions on government Americans viewed as essential to the protection of both liberty and property. And all too often the treaties through which tribes were incorporated into the United States were entered into in the immediate aftermath of open hostilities. In that context, it is far more believable that everyone – tribes and the federal government alike – understood that tribal justice systems were limited to resolving intra-tribal disputes.

C. Civil Tribal Court Jurisdiction Over Nonmembers, Absent Their Consent Or Congressional Authorization, Is Inconsistent With The United States' Overriding Sovereignty.

Even "ignoring treaty provisions and congressional policy," this Court concluded in *Oliphant* that tribes lack inherent authority to enforce their laws against nonmembers through their criminal courts for the independent reason that such jurisdiction is "inconsistent with [tribes'] status" and with the "overriding sovereignty" of the United States. 435 U.S. at 208-09 (emphasis, citation, and internal quotation marks omitted); *see also Duro*, 495 U.S. at 686 (the power to subject nonmembers to criminal trials in tribal courts is one of the "manifestation[s] of external relations between the Tribe and outsiders" that is "inconsistent with the Tribe's dependent status"). That irreconcilable conflict arises from tribal court jurisdiction over civil matters as well.

"Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. One of the principal interests of the federal sovereign has always been ensuring that "its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210. "Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.*

The same is true of attempts to subject nonmembers to civil claims in tribal court. "Whatever might be said of the historical record, we must view it in light of [the defendant's] status as a citizen of the United States." *Duro v. Reina*, 495 U.S. at 692. To be sure, this Court has emphasized that the deprivation of liberty attendant many criminal convictions gives rise to especially serious constitutional concerns. *See, e.g.*, *id.* at 687-88. But our Constitution is designed to protect citizens within the territory of the United States from unfair deprivations of property as well. *Oliphant* thus precludes tribal courts from exercising criminal jurisdiction over nonmembers even if the tribe seeks only criminal fines. Subjecting nonmembers to civil claims for punitive and other damages by a sovereign operating within the boundaries of the United States but existing outside the constitutional structure is just as inconsistent with the constitutional plan.

Of course, tribes retain special powers over their own members. But the "retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians *who consent* to be tribal members." *Duro*, 495 U.S. at 693 (emphasis added). That is, tribal authority outside of this constitutional framework "comes from the consent of its members." *Id.* It is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Id.* at 694. That additional extra-constitutional power, however, may extend no further than its justification, precluding "an extension of tribal authority over those who have not given the consent

of the governed that provides a fundamental basis for power within our constitutional system." *Id.*

In addition, the "special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate." *Duro*, 495 U.S. at 693. This Court has repeatedly noted that tribal courts can vary considerably from the norms that govern the judicial systems contemplated by the Constitution. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); *Duro*, 495 U.S. at 693. In both civil and criminal cases, tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve." *Duro*, 495 U.S. at 693. The Bill of Rights applies to neither criminal nor civil trials in tribal court. *Id.*; *Plains Commerce Bank Bank*, 554 U.S. at 337. The potential "subordinat[ion] to the political branches of tribal governments" that characterizes some tribal courts, *Duro*, 495 U.S. at 693 (citation and internal quotation marks omitted), is also a feature that applies to both civil and criminal cases.

Indeed, subjecting nonmembers to civil claims in tribal court is, in some ways, even *more* concerning, given that ICRA provides far less explicit protection for civil, compared to criminal, trials. For example, in criminal trials, ICRA protects against unreasonable searches, prohibits double jeopardy, provides a right against self-incrimination, guarantees a speedy and public trial by jury, imposes strict limits on criminal fines, provides a right to counsel, establishes minimum qualifications for presiding judges, and requires that criminal statutes be made available to the public. *See* 25 U.S.C. § 1302(a)(2)-(4), (6)-(7), (c). In contrast, ICRA does

not require that tribes publish their civil law. It does not extend the Seventh Amendment right to civil jury trials to tribal court. *See Santa Clara Pueblo*, 436 U.S. at 63. And although it requires tribes to provide "due process" generally, 25 U.S.C. § 1302(a)(8), some courts have construed this requirement to place fewer restrictions on tribal courts than the Due Process Clause imposes on state and federal courts, *see, e.g.*, *Alvarez v. Tracy*, 773 F.3d 1011, 1022 (9th Cir. 2014).

Holding that tribal courts nonetheless have civil jurisdiction over nonmembers would raise serious constitutional questions. This Court's "cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Duro*, 495 U.S. at 693-94 (citing *Reid v. Covert*, 354 U.S. 1 (1957) (addressing limits of court martial jurisdiction over civilians)); *see also Lara*, 541 U.S. at 208-09 (leaving open question whether Congress's subjecting nonmember Indians to tribal court criminal jurisdiction violates Due Process or Equal Protection Clauses); *id.* at 212 (Kennedy, J., concurring in the judgment) (calling statute "unprecedented" and casting doubt on its constitutionality). As it has in the criminal context, this Court should construe the scope of tribal authority in a way that avoids such serious constitutional questions. *See Duro*, 495 U.S. at 693-94.

D. Congress Is Best Suited To Decide Whether, When, And Under What Conditions Tribal Courts May Exercise Civil Jurisdiction Over Nonmembers.

By basing its allowance of tribal court jurisdiction in a theory of retained sovereign authority, the Fifth Circuit was necessarily compelled to hold that this power is available to *any* tribal court system, large or small, developed or undeveloped, trustworthy or corrupt. Unless the Court is likewise prepared to say that tribal courts' maturity, objectivity, and fairness have no bearing on the scope of tribal court jurisdiction, it should be obvious that Congress is far better suited to decide whether, when, and under what conditions tribal courts should be afforded jurisdiction over nonmembers.

No court, including this one, is well positioned to scrutinize the functioning of the hundreds of tribal court systems in this country. But Congress may conduct such an inquiry, or delegate it to an expert agency, using the considerable fact-finding resources of the legislative and executive branches. *Cf.* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908(b), 127 Stat. 54, 125 (creating application process by which Attorney General could approve expedited tribal court assumption of jurisdiction over nonmember domestic violence defendants).

Moreover, Congress is not compelled to reach a one-size-fits-all solution, but may parcel out jurisdiction based on a review of particular tribes' judicial systems. *See* Violence Against Women

Reauthorization Act of 2013, § 908(b). Congress may also decide to grant jurisdiction over particular kinds of cases or issues, as it did in the Violence Against Women Reauthorization Act in the criminal context. *See* 25 U.S.C. § 1304 (conferring tribal court jurisdiction over nonmembers accused of domestic violence on tribal lands). And as it has done there, Congress may enact specific requirements and limitations to protect nonmember defendants. *See id.* § 1304(d)-(e). Congress might, for example, decide to permit removal of cases involving nonmember defendants to federal court or authorize this Court to review tribal judgments in cases involving nonmembers. Or just as Congress has limited the amount of criminal fines that may be imposed even on tribe members, *see* 25 U.S.C. § 1302(a)(7), Congress might cap civil judgments, or limit or eliminate altogether some forms of relief, such as punitive damages. *Cf.* 42 U.S.C. § 1981a (establishing damages caps for certain federal civil rights claims).

E. Accepting Petitioners' Position Does Not Leave Tribes Powerless To Enforce Legitimate Rules Against Nonmembers.

Petitioners recognize that in *Montana*, this Court held that tribes retain some limited legislative authority to create rules for nonmember conduct on land within tribal control. No doubt, for example, tribes may forbid nonmembers from assaulting tribal police officers, as occurred in *Oliphant*. But as this Court's decision in that case demonstrates, it does not follow that tribes have free rein to enforce even entirely legitimate rules against nonmembers through litigation in tribal courts. Nor does denying

tribal courts civil jurisdiction over nonmembers (absent the defendant's consent or congressional authorization) render those regulations meaningless for lack of any way to enforce them.

To start, tribes retain their traditional power to exclude nonmembers from their lands for non-compliance with legitimate tribal rules. *See Plains Commerce Bank*, 554 U.S. at 327-28. For example, the Tribe exercised that power in this case to expel the alleged perpetrator from the reservation. Pet. App. 57. Excluding nonmembers who violate tribal law not only protects the tribe from further harmful conduct, but also may provide leverage to negotiate penalties or compensation for victims in exchange for withholding that sanction.

Second, injured tribe members may bring suit in state, and often federal, court. As citizens of the states in which they reside, tribe members may file suit in state court for injuries suffered on a reservation within that state. *See, e.g.*, *Strate*, 520 U.S. at 459; *Three Affiliated Tribes v. World Eng'g, P.C.*, 476 U.S. 877, 880 (1986); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172-73 (1973). Where appropriate, choice of law principles may require state courts to apply tribal law in such cases. Moreover when the citizenship of the parties is diverse, tribal plaintiffs may often also file suit in federal court. 28 U.S.C. § 1332. Accordingly, at any point during the last nine years of litigation over tribal court jurisdiction, the Does could have submitted their claims to the more neutral forum of a sovereign of which both the plaintiffs and the defendants were members.

Third, tribes can litigate civil claims against nonmembers without permission from Congress so long as the defendant consents. The right to avoid tribal court jurisdiction is a personal right, akin to the right to a judicial forum to resolve a legal claim, which may be waived. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (noting that even if state otherwise lacks jurisdiction over non-consenting tribe member, state court may hear suit filed by tribe member); *id.* (assuming tribal court may exercise civil jurisdiction over suit filed *by* nonmember); *cf. also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (parties may waive right to judicial forum by agreeing to submit to arbitration). A nonmember may, for example, consent by initiating the litigation in tribal court. *See Williams*, 358 U.S. at 219-20. Or a nonmember may consent by appearing voluntarily to defend a case in tribal court without interposing a timely jurisdictional objection. *Cf., e.g.*, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (personal jurisdiction may thus be waived).

A defendant may also consent in advance, for example, by agreeing to a forum selection clause in a contract. *See Plains Commerce Bank*, 554 U.S. at 364 (Ginsburg, J., dissenting). Thus, a tribe can ensure tribal court jurisdiction over mineral lease disputes by insisting on provisions in their leases that require such disputes to be resolved in tribal court on the basis of tribal and federal law. And while the Court need not decide the question in this case, *see infra*, at 46, it is also possible that tribes could condition other tribal government benefits, including the right to do

business on a reservation, on a nonmember's agreement to submit certain disputes to tribal court adjudication. *But cf.* Cert. Supp. Br. 10-12 (noting risk of allowing tribes to leverage right to exclude from reservation into authority to pervasively subject nonmember conduct to tribal regulation and adjudication).

However, none of this helps respondents in this case. Regardless of the specific mode of consent, it must be knowing and unambiguously expressed. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 341-42 (bank did not consent to tribal criminal jurisdiction over former customer's discrimination claims by filing eviction proceeding in tribal court); *cf. Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998) (holding that the "waiver of employees' statutory right to a judicial forum" must be "clear and unmistakable"). And there is no basis to claim that petitioners consented, expressly or by implication, to the tribal jurisdiction asserted in this case. Certainly petitioners never consented to this specific tribal court litigation, instead objecting to the court's jurisdiction at every turn. *See* Pet. App. 3-5. Nor have petitioners ever consented to tribal court adjudication of these claims in a contract with Doe (with whom petitioners had no contract) or the Tribe. While the Tribe required Doe and his parents to sign an agreement with the tribe to participate in the Youth Opportunity Program, J.A. 77-81, there was no contract governing Dollar General's acceptance of Doe's placement in the store. And while the store is operated on the reservation pursuant to a lease with the Tribe, the district court correctly found that nothing in the lease comes close to unequivocally

consenting to tribal court jurisdiction over tort claims against petitioners by members of the tribe. *See* Pet. App. 62-63.[33] To the contrary, the only provisions addressing choice of forum provide solely for tribal court jurisdiction over disputes concerning the lease itself. *See* J.A. 47-48; Petr. Cert. Supp. Br. 8-9. That the lease provides only for tribal court jurisdiction over disputes about the lease strongly suggests that the parties did not contemplate tribal jurisdiction over anything else. Finally, the only condition imposed on obtaining a business license on the reservation is the promise to pay applicable taxes. *See* Pet. App. 76 n.1 (quoting Choctaw Tribal Code § 14-1-3(1)).

Any claim that petitioners have otherwise *implicitly* consented to tribal jurisdiction through its contacts with the tribe and its members is both unsupported and insufficient. Such a claim "is little more than a variation of the argument" – rejected by this Court time and again – "that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Duro*, 495 U.S. at 695; *see also Plains Commerce Bank*, 554 U.S. at 328; *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

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[33] Nor, as the district court observed, is there a sufficient nexus between that commercial relationship and the tort claim asserted. *See* Pet. App. 62-63; *see also Plains Commerce Bank*, 554 U.S. at 338 ("[W]hen it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'") (citation omitted).

Accepting petitioners' position simply puts tribal jurisdiction over nonmembers in roughly the same position as state court jurisdiction over citizens of other states. That is, in state court, out-of-state defendants may agree to submit to a state court's jurisdiction in advance (*e.g.*, through a contract) or at the time of litigation (*e.g.*, by failing to object to the court's jurisdiction). But otherwise they generally retain the right to require the case be adjudicated in the forum of a sovereign to which both parties belong by removing the case to federal court. *See* 28 U.S.C. § 1441. So, too, nonmembers of a tribe may consent to tribal court jurisdiction, but generally retain the right to require the plaintiff to litigate the case in the courts of a state (or federal) government in which all parties equally participate.

III. Tribes May Not Regulate Nonmember Conduct Through Unwritten Tort Law Under The First *Montana* Exception.

The tribal court lacked jurisdiction in this case for a second, independent reason. "According to [this Court's] precedents, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). And, as discussed, "efforts by a tribe to regulate nonmembers" are "presumptively invalid." *Id.* (citation and internal quotation marks omitted). Instead, tribes' legislative jurisdiction over nonmembers is confined to the two categories of cases described by the *Montana* exceptions, the first premised on the regulated party's consent and the second on the need for tribal self-protection. *See id.*

at 332, 341. Respondents have abandoned any claim that jurisdiction in this case can be supported under the second exception. *See* Pet. App. 10. So the question is whether it can be justified under the first. It cannot.

A. The First *Montana* Exception Provides A Narrow Allowance For Regulation Of Nonmembers, Premised On Consent Of The Governed.

Under the first *Montana* exception, a "tribe may regulate, *through taxation, licensing, or other means*, the activities of nonmembers who *enter consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added). Application of this exception is guided by three principles.

First, tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank*, 554 U.S. at 337. Accordingly, when construing the scope of this exception, courts must avoid the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Id.*

Second, the *Montana* exceptions "are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Id.* (citations and internal quotation marks and citations omitted).

Third, like all exercises of retained inherent authority, regulations under the first *Montana* exception ultimately "must stem from the tribes' inherent sovereign authority to set conditions on

entry, preserve tribal self-government, or control internal relations." *Id.* at 337.

The Fifth Circuit's conclusion that tribes may impose tort liability on any company doing business on a reservation so long as the alleged tort has a "logical nexus to some consensual relationship between a business and the tribe or its members," Pet. App. 17, cannot be squared with these principles.

B. Regulation Through Unwritten Tort Law Is Not An "Other Means" For Regulating Consensual Relationships Within The Meaning Of The First *Montana* Exception.

Petitioners do not contest for purposes of this case that tribes may engage in *some* forms of regulation of nonmember businesses operating on tribal lands, including possibly matters relating to the employment of tribe members. *See Plains Commerce Bank*, 554 U.S. at 334-35. Nor do petitioners dispute that "the tribal tort at issue here is a form of regulation." *Id.* at 332. Instead, the question is whether regulation through tort litigation in tribal court is among the "other means" of regulating consensual relationships this Court contemplated when it described the first *Montana* exception. *See Montana*, 450 U.S. at 565. It is not.

The essence of the first *Montana* exception is consent. *Montana*, 450 U.S. at 565. That consent provides the only possible justification for subjecting a citizen of the United States to a legal authority existing outside of, and unconstrained by, our constitutional structure, particularly when the nonmember's conduct poses no serious threat to the

political integrity, economic security, or health or welfare of the tribe. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 337; *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); *Duro v. Reina*, 495 U.S. 676, 694 (1990).

Just as a tribe's *adjudicatory* jurisdiction can be established by a defendant's express consent through a forum selection clause, a nonmember may consent to a tribe's *legislative* jurisdiction through a choice of law provision in a contract or by similar express means. As noted, there was no such express consent in this case. So the question is whether petitioners *implicitly* consented through their conduct. Nonmember consent can arise only from knowingly accepting conditions on their right to enter tribal lands or enjoy tribal resources. *See Plains Commerce Bank*, 554 U.S. at 335. But for that implied consent to be knowing and voluntary, nonmembers must be provided clear notice of what activities will subject them to tribal authority and what the governing law requires of them. *See id.* at 337-38.

Thus, in illustrating the kinds of regulation permitted by the first *Montana* exception, this Court cited to cases involving laws whose application and meaning could be discerned *ex ante* with reasonable certainty. *See Montana*, 450 U.S. at 565-66 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959) (contract dispute); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tax on grazing livestock on tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (business permit tax); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-54 (1980) (tax on cigarette sales occurring on reservation)). In three of these cases, a tribe was permitted to enforce a

written statute or ordinance that had been approved by the Federal Government and provided clear requirements with respect to discrete activities. *See Washington*, 447 U.S. at 144, 153; *Morris*, 194 U.S. at 385 & n.1; *Buster*, 135 F.3d at 940. The nonmember plaintiff in the fourth case sought enforcement of a contract against Navajo customers. *See Williams*, 358 U.S. at 222-23.[34]

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[34] In *Williams*, this Court did not directly hold that Navajo courts would have jurisdiction over such a claim, only that Arizona's courts lacked jurisdiction. *Id.* It is fair to say, however, that the opinion suggests that the Court assumed that the suit could be heard in the courts operating on the Navajo reservation. *See id.* at 223. However, those courts were not tribal courts like the ones at issue in this case. Instead, the only courts operating on the Navajo reservation at the time were Courts of Indian Offenses, established and ultimately controlled by the Federal Government. *See id.* at 222 ("Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."); *United States v. Wheeler*, 435 U.S. 313, 327 (1978) (explaining that "before the Navajo Tribal Council created the present Tribal Code and tribal courts" in 1958-59, "the Bureau of Indian Affairs established a Code of Indian Tribal Offenses and a Court of Indian Offenses for the reservation"). Such courts are obviously differently situated than tribal courts operating outside the purview of the Federal Government and the U.S. Constitution. *See Duro*, 495 U.S. at 689-90 (treating jurisdiction exercised by Courts of Indian Offenses as a form of *federal*, not *tribal*, power).

In addition, the suit in *Wilson* was brought *by* a nonmember against a tribal defendant. As discussed above, a nonmember may consent to tribal jurisdiction by filing suit in tribal court. *See supra* at 43-44. But it is an entirely different question whether a tribal court may exercise jurisdiction over an unconsenting nonmember defendant. *See Nevada v. Hicks*,

Notably, none of the examples this Court gave to illustrate the first *Montana* exception involved a tort claim. Indeed, this Court has never upheld application of tribal tort law to a nonmember. For good reason: tort law is fundamentally different. For one thing, tort law creates particularly difficult problems of notice and consent. Unlike tax statutes and business licensing requirements, tort law is generally unwritten. In this case, for example, any company wishing to determine the tort rules applicable to its business would find that while the Choctaw Tribal Code expressly provides jurisdiction to hear tort claims against nonmembers, *see* Choctaw Tribal Code § 1-2-3(g), it contains no codification of general tort law. *See id.* § 1-1-4.

Tribal court precedent may provide some guidance on the content of tribal tort law, but given that many tribal court systems have only recently been created, precedents can be sparse, in addition to often being difficult to access. *See, e.g.*, Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 LAW LIBR. J. 199, 199-200 (2014). At the same time, nonmembers cannot count on tribal law mirroring the state or federal law with which they may be more familiar. *See, e.g.*, *Plains Commerce*, 554 U.S. at 338 (noting

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533 U.S. 353, 358 n.2 (2001). That, no doubt, is why, at the time of *Wilson*, "general federal law prohibit[ed] Courts of Indian Offenses (tribunals established by [federal] regulation for tribes that have not organized their own tribal court systems) from exercising jurisdiction over unconsenting nonmembers." *Id.* at 383 (Souter, J., concurring) (citing 25 C.F.R. § 11.103(a) (2000)); *see also supra* at 32-33 n.29.

"novel" legal rule applied by tribal court based on "Lakota tradition as embedded in Cheyenne River Sioux tradition and custom"). Indeed, these differences can be a point of pride among the tribes, reflecting each tribe's "unique customs, languages, and usages." *Duro*, 495 U.S. at 693.

Accordingly, as a practical matter, it is often impossible for a business to discern the content of all the tort law and tribal traditions potentially applicable to its relationship with tribal employees and customers. Like other tribes, the Choctaw contemplate that even tribal judges may be ignorant of the law they must apply in all its relevant details, providing that, when "doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages." Choctaw Tribal Code § 1-1-4; *see also supra* at 7 n.16 (collecting citations to other tribal codes)

In addition, to meaningfully consent in advance to tribal tort regulation, a nonmember must be able to know *when* it will apply. That is easy enough to discern when it comes to taxes, contracts, and business licenses. But when jurisdiction is founded on the tribal membership of an employee, or the tribal identification of a corporation, it may be difficult or impossible for a business to know whether any particular transaction or course of conduct is governed by tribal law. It would require, for example, that a company doing business on the reservation inquire into the race and tribal membership of its employees and customers, and have a way of determining the tribal identity of a corporation that may have owners, officers, and

employees of various ethnic groups and tribal affiliations.

The notice difficulties are compounded by the requirement that the conduct concerning a tribe or its member must take place on tribal land. *See Plains Commerce Bank*, 554 U.S. at 333. While in some cases, a defendant may conduct business on a clearly marked reservation, in other cases a defendant may simply be passing through land difficult to identify as tribal. After all, in many states, reservations consist of a patchwork of small land holdings that may or may not be marked as tribal land. The reservation of the Mississippi Band of Choctaw Indians, for example, "contains more than 35,000 acres of land situated throughout Mississippi in ten different counties."[35]

The special role tribal courts play in developing and administering tort law provides further reason for caution. *See Duro*, 495 U.S. at 693. The features of tribal courts that risk unfair treatment of outsiders – the lack of judicial training and independence, the risk of local bias and the limited protections against it, etc., *see supra* at 2-9, 39 – give rise to the risk that the law a business reasonably expected to govern its conduct will not be the law applied to it in a particular litigation.

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[35] *MBCI Communities*, Mississippi Band Choctaw Indians, http://www.choctaw.org/aboutMBCI/community/index.html (last visited Aug. 29, 2015).

C. As Construed By The Fifth Circuit, The First *Montana* Exception Would Swallow The Rule.

The Fifth Circuit's decision also cannot be reconciled with this Court's instruction that the *Montana* exceptions not be permitted to "swallow the rule" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank*, 554 U.S. at 330 (citations and internal quotation marks omitted).

Tort law is quite different from the specific taxes and contract enforcement this Court had in mind in *Montana*, in that tort law applies to nearly every aspect of a nonmember's conduct on the reservation. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 6 (5th ed. 1984) (noting breadth of tort law's purview). Allowing tribes to impose tort law obligations with respect to every consensual relationship nonmembers form with a tribe or its members effectively means tribal regulation of nearly everything a nonmember does on the reservation. In this way, the breadth of tribal regulation is comparable to the criminal jurisdiction this Court has held tribes necessarily surrendered upon incorporation into the United States. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). And it comes close to re-establishing the tribes' clearly divested authority to govern everyone who comes onto tribal land. *See Duro*, 495 U.S. at 685-86.

D. The Fifth Circuit's Application Of The First *Montana* Exception Untethers Tribal Regulation From The Tribes' Interest In Managing Tribal Land, Protecting Self-Government, And Controlling Internal Relations.

The scope of the jurisdiction claimed in this case thus illustrates a deeper flaw in the Fifth Circuit's reasoning. For imposing tort regulation on nearly everything a company does on a reservation extends the tribe's legislative power far beyond what is necessary to protect the "tribe's sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling internal relations." *Plains Commerce Bank*, 554 U.S. at 335 (citations and internal punctuation omitted); *see also Montana*, 450 U.S. at 564 (the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

This case illustrates the problem. Although a tribe may understandably wish to regulate nonmember conduct that injures tribe members, the retained inherent power of self-government has never extended to all nonmember conduct that harms a tribe member; to the contrary, from the earliest days of incorporation, tribes have been expected to turn to the states and the Federal Government to remedy the harmful conduct of nonmembers. *See supra* § II.A; *Strate*, 520 U.S. at 457-58. Moreover, the conduct at issue in this case has no bearing on *internal* relations as this Court has conceived of that power. *See Hicks*, 533 U.S. at 360-61 (authority over internal relations

includes power to determine tribal membership, prosecute member-on-member crimes, and regulate domestic relations) (citing *Montana*, 520 U.S. at 459).

Nor does the regulatory power asserted here have a sufficient relation to "managing tribal land." *Plains Commerce Bank*, 554 U.S. at 334. The tort asserted in this case does not, for example, concern the sale of tribal land, the extraction of reservation resources, or the zoning of property within the reservation. *See, e.g.*, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tax on resource extraction); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tax on grazing on tribal lands). To be sure, the tort alleged took place on a reservation. But, this Court has repeatedly emphasized that a tribe's retained inherent authority to manage tribal property and control entry onto reservation land does not extend so far as to authorize pervasive regulation of nonmembers' conduct on reservation land. *See Plains Commerce Bank*, 554 U.S. at 328; *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993); *Duro*, 495 U.S. at 685-86, 695-96; *Montana*, 450 U.S. at 565.[36]

That the first *Montana* exception did not open the door to pervasive tribal regulation of

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[36] Even if tribes had the authority to condition entry onto tribal reservations upon nonmembers' consent to tribal tort regulation of all their consensual interactions with the tribe and its members, this Tribe has never conveyed such a condition to nonmembers.

nonmembers should be unremarkable given the history described above. The *Montana* exceptions were intended to codify – not dramatically expand – the prior boundaries of tribal authority recognized in this Court's cases on the basis of its analysis of the history of the United States' treaties with the tribes and the necessary consequences of their incorporation into the United States. For the reasons discussed above, that history is inconsistent with any claim that Tribes have retained authority to regulate nonmembers through the medium of tort suit in tribal courts. The recent vintage of tribal attempts to subject nonmembers to tort claims in tribal court is strong reason to doubt that it was understood as an essential aspect of tribal authority to be retained after incorporation.

* * * * *

Petitioners do not deny the conscientious effort of many tribes to improve the quality, objectivity, and professionalism of their courts. But that is a "consideration[] for Congress to weigh in deciding whether Indian tribes should finally be authorized to" exercise civil court jurisdiction over nonmembers. *Oliphant*, 435 U.S. at 212. It has "little relevance" to the question whether the jurisdiction claimed in this case has *existed for more than a century*, even before tribes had modern court systems and even for those tribes that lack fair and reliable judicial systems today. *Id.* History and the decisions of this Court make clear that the authority asserted by the Tribe in this case is not a power tribes retained, but is one they must ask Congress to restore.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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August 31, 2015

RESPONDENT'S BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE, SR. AND JANE DOE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.

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IN THE

Supreme Court of the United States

No. 13-1496

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,
Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE, SR. AND JANE DOE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS

INTRODUCTION

This case arises from allegations that the manager of a store located on trust land within the Mississippi Choctaw Reservation sexually molested a thirteen-year-old Choctaw child under his supervision. The child worked in the store as part of the Tribe's Youth Opportunity internship program in which the store had expressly agreed to participate, and the store was operating under a lease agreement and a business license with the Tribe. The question before this Court is whether the Choctaw child may seek civil redress through the Tribe's court system for injuries that arose directly from these consensual relationships with the Tribe and its members.

Four successive tribunals—the Tribe's civil court, the Tribe's supreme court, a federal district court,

and a federal court of appeals—have agreed that the suit may proceed in the Choctaw courts. They have based their decisions on a straightforward application of this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), which permits tribes to exercise civil jurisdiction over nonmembers engaged in consensual relationships with the tribe or its members on tribal land if there is a nexus between the nonmember's relationship with the tribe or tribal members and the claims pled.

Petitioners now ask this Court to deny the tribal plaintiffs in this case a tribal forum to vindicate their rights. Even worse, they invite this Court to bar tribal jurisdiction over *all* civil suits against nonmembers based on *Oliphant* v. *Suquamish*, 431 U.S. 191 (1978), which limited a tribe's criminal jurisdiction to its members. But this Court already declined that invitation when it held, more than thirty years ago, that "*Oliphant* does not apply" in the civil context. *Nat'l Farmers Union* v. *Crow Tribe of Indians*, 471 U.S. 845, 854 (1985). Petitioners offer nothing close to the extraordinarily compelling rationale necessary to justify overturning this precedent.

Instead, petitioners rely primarily on suspect inferences gleaned from inapplicable treaties and superseded statutes from more than a century ago. And they set forth policy arguments drawn from that same historical period, contending that tribal law and tribal courts are simply unfit for nonmembers.

This Court should once again decline to establish limits on tribal civil jurisdiction grounded in a mercifully bygone era. The ability to exercise adjudicative authority over nonmembers who have implicitly or explicitly consented to jurisdiction is essential to the

"right of the Indians to govern themselves." *Williams* v. *Lee*, 358 U.S. 214, 223 (1959). The tribes have retained this power, and the Court should not strip it from them now.

STATEMENT

A. The Choctaw Court System

The Mississippi Band of Choctaw Indians (the "Tribe") is the only federally recognized Indian tribe in Mississippi. *See* 80 Fed. Reg. 1942, 1944 (Jan. 14, 2015). Its 10,000-plus members include descendants of those Choctaw Indians who avoided forcible relocation west of the Mississippi River under the federal government's Indian-removal policies of the 1830s. Carl Waldman, *Encyclopedia of Native American Tribes* 71 (3d ed. 2006). The Tribe's initial reservation was established in Mississippi in 1944, and the Mississippi Band of Choctaw Indians was recognized as a separate tribe in 1945. *See United States* v. *John*, 437 U.S. 634, 638-647 (1978); 8 Jeffrey Jackson & Mary Miller, *Encyclopedia of Mississippi Law* § 72:1, at 374 (2001).

The Tribal Constitution establishes a representative, democratic form of government. It guarantees equal protection and due process to "any person within its jurisdiction." Choctaw Const. art. X, § 1(h). There are three branches of the Choctaw government. The Constitution establishes a Tribal Council of seventeen elected representatives (the legislature) and an elected Tribal Chief (the executive). *See id.* arts. IV, V, VIII, IX. A separate judiciary was established by the Tribal Council 30 years ago, as authorized by the Constitution. *Id.* art. VIII. "The Tribal government carries out functions similar to local, state and federal governments, and is respon-

sible for providing Tribal members and other persons on the reservation with education, health care, job training, housing, police and fire protection, Tribal courts, utilities and other community infrastructure." 8 Jackson & Miller, *supra*, § 72:5, at 379; *see also* Office of the Tribal Chief, Mississippi Band of Choctaw Indians, *Tribal Profile* (2014).[1]

The Tribe's judicial branch is highly developed:

> The Mississippi Band of Choctaw Indians has created a vibrant economy, and one of the underpinnings of its success is its court system. Organized independently of elected leadership, the court provides an arena for the fair, reliable resolution of disputes. * * * Through its structure and rulings, the court is able to provide assurance to business interests, tribal citizens and families, and neighboring communities that the Band and its judicial institutions are fair and equitable to all.

Harvard Project on American Indian Economic Development, *Constitutions and Fundamental Government Reform: Lessons in Excellence in the Governance of American Indian Nations* 11, 13 (2010).[2]

The Choctaw Tribal Court System has four divisions: civil court, criminal court, youth court, and peacemaker court. Choctaw Tribal Code § 1-3-1. A three-justice Choctaw Supreme Court reviews civil and criminal appeals and is the final interpreter of

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[1] *Available at* http://www.choctaw.org (last visited Oct. 14, 2015).

[2] *Available at* http://goo.gl/qo9SRr (last visited Oct. 14, 2015).

Tribal law. *Id.* § 1-3-2; 8 Jackson & Miller, *supra*, § 72:7, at 381-382.

The Tribe's laws delineate requirements for admission to legal practice, Choctaw Tribal Code §§ 1-4-1 to -3, and for judicial service, *id.* §§ 1-3-3, -4. The judiciary is governed by a Code of Ethics, which recognizes that "[a]n independent and honorable judiciary is indispensable to justice on the Choctaw Indian Reservation." *Id.* § 1-6-7, Canon 1. Judicial nominees are vetted by the Committee on Judicial Affairs and Law Enforcement of the Tribal Council. *Id.* § 1-3-3(3). And the Tribal Code requires that civil-court judges have graduated in good standing from accredited law schools and be members of the Mississippi state bar. *Id.* § 1-3-3(2). Justices of the Choctaw Supreme Court must have two years' experience as judges in state, federal, or Tribal court—three years in the case of the Chief Justice. *Id.* § 1-3-4.

The Choctaw Courts are charged with providing "an effective means of redress in civil cases" that arise from a defendant's "presence, business dealings, or contracts, or other actions or failures to act, or other significant minimum contacts on or with the Reservation." *Id.* § 1-2-1. In general, the Choctaw Courts exercise subject-matter jurisdiction over civil causes of action occurring on reservation lands that involve the interests of the Tribe or its members. *Id.* § 1-2-5; *see also id.* § 1-2-2(3) (limited extraterritorial jurisdiction); *id.* § 1-2-3(2)(g) (long-arm statute asserting jurisdiction over any person who commits torts on tribal lands subject to the *Montana* limitations); *id.* § 1-5-4 (sovereign immunity); *id.* § 1-5-10 (authorizing suits to enjoin unlawful conduct of the Tribe or Tribal officials in violation of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1301 *et*

seq., or other federal or tribal law); 8 Jackson & Miller, *supra*, § 72:9, at 383-387.

The Choctaw Courts apply federal, state, and Tribal law. In the first instance, the Tribal Code directs the courts to follow any "applicable laws of the United States and authorized regulations of the Secretary of the Interior." Choctaw Tribal Code § 1-1-4; 8 Jackson & Miller, *supra*, § 72:12, at 389 ("Where there is applicable federal law, federal law controls."). Where pertinent, the courts may also apply the "ordinances, customs, and usages of the Tribe." Choctaw Tribal Code § 1-1-4. And if neither federal nor Tribal law applies, the court applies "the laws of the State of Mississippi." *Id.* As a result, Choctaw common law includes a blend of Tribal and state law sources. *See* 8 Jackson & Miller, *supra*, § 72:12, at 390. Choctaw tort suits, in particular, typically borrow from state law.

Civil actions under Choctaw law display many features familiar to state practitioners. The Tribe has promulgated rules of civil procedure and evidence modeled after Mississippi's rules. Choctaw Tribal Code tit. VI; *see* 8 Jackson & Miller, *supra*, § 72:12, at 390. And civil actions in Tribal courts are circumscribed by a statute of limitations. Choctaw Tribal Code § 1-5-6. The Tribe has also enacted a wide range of substantive statutes governing everything from taxation, *id.* tit. XIV; to sales and other commercial transactions, *id.* tit. XXVI; to labor organizations, *id.* tit. XXX. And it has adopted several articles of the Uniform Commercial Code. *See id.* tit. XXVI; 8 Jackson & Miller, *supra*, § 72:14, at 391. The Tribe's Constitution, Bylaws, and Tribal Code

are readily accessible online.[3] And copies of the Code and "all laws or rules which are incorporated by reference from other jurisdictions into the Tribal Code" are available for public inspection at the Tribal Court, along with copies of civil case files. Choctaw Tribal Code §§ 1-5-1, -2.

Nonmember litigants routinely appear before—and prevail in—the Choctaw Courts. The Tribe has surveyed the Choctaw Tribal Court records and determined that, between January 1, 2013, and September 21, 2015, almost 5,000 cases involving nonmembers were adjudicated in the Choctaw courts. Many of these were actually suits initiated by nonmembers to collect debts from tribal members and to satisfy judgments through the garnishment of wages. Over 85% of the suits involving nonmembers resulted in a settlement or a win for the non-Indian party.[4]

The Choctaw court system is highly advanced, but it is hardly anomalous. Most modern tribal judiciaries are based not on traditional Indian dispute-resolution systems, but rather on Western-style tribunals. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1-2 (1997). All litigants in tribal courts benefit from the procedural protections of the ICRA. These include guarantees of due process and equal protection, as well as a bar on *ex post facto* laws and bills of attainder. *See* 25 U.S.C. § 1302(a)(8), (9). In applying these protections, tribal courts typically look to "settled federal or state case law." Matthew

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[3] *Available at* http://goo.gl/jB3eQF (last visited Oct. 14, 2015).

[4] These data are drawn from publicly available case files at the Office of the Clerk, Choctaw Tribal Courts.

L. M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* (2008) (manuscript at 7);[5] *see also* Matthew L. M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Col. L. Rev. 59, 91 (2013) (tribal courts depart from federal- and state-law norms when tribal law provides "stronger guarantees of fundamental fairness"). And tribal courts consistently enforce these protections in cases involving members and nonmembers alike. *See, e.g.*, *Miss. Band of Choctaw Indians* v. *Peeples*, No. SC-2008-05 (Choc. Sup. Ct. 2009) (noting jurisdiction over suits filed by any person against tribal officials to enjoin violations of ICRA or other applicable federal and tribal law); *In re A.P.* v. *Tuba City Family Ct.*, 6 Am. Tribal Law 660 (Nav. Sup. Ct. 2005) (vacating exclusion order against nonmember minor on due process grounds).

B. Factual Background

Since 2000, petitioners Dollar General Corp. and Dolgencorp, LLC (collectively, "Dollar General") have operated a Dollar General variety retail store on the Choctaw Reservation. Pet. App. 76; J.A. 28. Petitioners' store sits in the Choctaw Town Center, a shopping plaza located within the boundaries of the Reservation, on tribal land.[6] Pet. App. 76.

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[5] *Available at* http://goo.gl/YPyRMu (last visited Oct. 14, 2015).

[6] Throughout this brief, "reservation land" refers to all land within the boundaries of a Tribe's "Indian country," *see Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 526-527 (1998), including nonmember-owned fee lands. By contrast, "tribal land" refers to land that is both Indian country and is also either owned by the tribe or its members, or held in trust for the tribe or its members by the federal government. There

Dollar General holds a long-term commercial lease agreement with the Choctaw Shopping Center Enterprise, an entity wholly owned by the Tribe. *Id.* Among the lease provisions is a forum-selection clause in which the parties agree that "[e]xclusive jurisdiction and venue" for any lease-related disputes lie with the Tribal Court of the Mississippi Band of Choctaw Indians. J.A. 48. Petitioners also maintain a valid Tribal business license to engage in commercial activities, as required by the Tribal Code. Pet. App. 76; *see* Choctaw Tribal Code § 14-1-4(1).

For nearly thirty years, the Tribe has run a voluntary job-training initiative known as the Youth Opportunity Program ("YOP"). J.A. 51; Pet. App. 2-3; 40. The program is designed to place Tribal youth in short-term positions with local businesses to help them develop job and life skills. *See* J.A. 51. Each year, YOP administrators survey local employers to gauge their interest in participating and to help match participating youth to jobs that meet their interests. *Id.* at 57. Because the YOP pays the young Tribal members' wages, participating businesses benefit from this free labor. *Id.* at 52-53. Some *four hundred* school- and college-aged youth participated in the YOP at the time of the events that gave rise to this suit. *Id.* at 56.

In 2003, Dale Townsend, the manager of the Dollar General store on the Choctaw Reservation, agreed on petitioners' behalf that the Dollar General Store would participate in the YOP. *Id.* at 66; *see* Pet. App.

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is no dispute that the underlying lawsuit arises out of conduct that took place on tribal lands, here reservation trust lands. *See* Pub. L. No. 106-228, § 1(a), 114 Stat. 462 (2000).

45-46. That summer, the Tribe placed respondent John Doe, then a thirteen-year-old member of the Tribe, and several other Choctaw students, in the Dollar General store under Townsend's supervision. Pet. App. 3; *see* J.A. 60 (describing the supervisor's responsibilities).

Doe alleges that, during this placement, Townsend sexually molested him. In connection with these allegations, the Choctaw Attorney General's office brought an action in Tribal Court to exclude Townsend from the Reservation. Pet. App. 77; *see* Choctaw Tribal Code §§ 20-1-1 to -5. Townsend did not oppose the action, and the Tribal Court approved the Tribe's request. Pet. App. 77-78.

C. Procedural History

In 2005, Doe filed suit by and through his parents in Choctaw Tribal Court against petitioners and Townsend. J.A. 11. The suit alleged that Townsend had sexually molested Doe during his YOP assignment at the Dollar General store. *Id.* at 13. Specifically, Doe alleged that Townsend had on two occasions subjected him to unwanted sexual advances and offensive touching. *Id.* He charged that Townsend had followed him into the store's stockroom and made sexual advances, which Doe had rebuffed. *Id.* On another occasion, Townsend allegedly "grabbed [Doe] in his crotch area and stopped only when [Doe] escaped from his grasp." *Id.* Doe alleged that, after this encounter, Townsend continued to make sexually offensive remarks and advances. *Id.*

In addition to asserting claims for assault and battery against Townsend directly, Doe claimed that Dollar General was vicariously liable for Townsend's acts. *Id.* at 12-13. He also alleged that Dollar Gen-

eral negligently hired, trained, or supervised Townsend. *Id.* at 14. And he claimed that he had suffered severe mental trauma and sought medical treatment as a result of Townsend's actions. *Id.* The complaint sought compensatory and punitive damages. *Id.*

Doe's complaint also alleged the following jurisdictionally relevant facts, which are not in dispute as this case comes to the Court: (1) that Doe is a member of the Tribe; (2) that he was assigned through the YOP to work at the Dollar General store in the Choctaw Town Center; and (3) that all of the alleged conduct occurred in that store on Tribal land. *Id.* at 12-13.

1. Proceedings in the Choctaw Tribal Courts

Dollar General and Townsend moved to dismiss Doe's claims for lack of subject-matter jurisdiction. Pet. App. 3, 78; *see* Choctaw R. Civ. P. 12(b)(1). The Choctaw Civil Court denied the motions to dismiss, and the defendants exercised their right to seek interlocutory review before the Choctaw Supreme Court. Pet. App. 3; *see* Choctaw Tribal Code § 7-1-10. In February 2008, with the issues fully briefed and argued, the Tribe's high court granted the defendants' motion for permission to appeal. Pet. App. 78-80. The Choctaw Supreme Court concluded that the lower court's exercise of subject-matter jurisdiction was proper, relying on several opinions of this Court, including *Montana* v. *United States*, 450 U.S. 544 (1981). Pet. App. 82-90.

The Choctaw high court's opinion focused on the consensual relationship that arose from Dollar General's lease and business license with the Tribe, Dollar General's agreement to participate in the Tribe's

YOP, and the nexus between those relationships and the alleged torts. Pet. App. 85-87. After holding that there was jurisdiction based on these facts, the Choctaw Supreme Court remanded Doe's case to the trial court for further proceedings. *Id.* at 91.[7]

2. Proceedings in the U.S. District Court

Dollar General and Townsend then filed a complaint in the U.S. District Court for the Southern District of Mississippi against the Tribe, the Tribal Court, Tribal Court Judge Christopher A. Collins, and John Doe. J.A. 19-27. Dollar General claimed the Tribal Court lacked jurisdiction to adjudicate Doe's claims and sought a temporary restraining order and preliminary injunction. Pet. App. 4. In December 2008, the District Court denied Dollar General's motion.[8] *Id.*

After discovery, the parties filed cross-motions for summary judgment. *Id.* at 5. Respondents agreed to stay Tribal Court proceedings until there was a final district court order on the motions. C.A. App. 313-314, 392.

In December 2011, the District Court granted respondents' motion and denied Dollar General's. Pet.

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[7] Sensitive to due process considerations, the Choctaw Supreme Court stayed proceedings on remand until the Tribe's Attorney General's office could indicate whether it would consent to a modification of Townsend's exclusion order that would permit him to enter the Reservation to defend or testify in Doe's suit. Pet. App. 81-83, 91.

[8] The District Court granted Townsend's motion, holding that the Tribal Court lacked jurisdiction over him because he had no independent consensual relationship with the Tribe. Pet. App. 5. Respondents have not appealed that ruling, and Townsend is no longer a party to the litigation.

App. 54. The District Court found that it was undisputed that Townsend had agreed to participate in the YOP on petitioners' behalf, and to have Doe placed under his direct supervision. *Id.* at 45. Although "Doe did not thereby become an employee" of Dollar General, he "functioned as an unpaid intern or apprentice, receiving job training from [Dollar General] and in turn provided free labor to [Dollar General] for the period of his assignment." *Id.* at 45-46.

Through this business arrangement, the court determined, Dollar General "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. Because Doe's tort claims of sexual molestation arose "directly from this consensual relationship," the complaint satisfied "the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority." *Id.* (citing *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001); *Montana*, 450 U.S. at 566).

3. The Decision Below

Dollar General appealed. Petitioners claimed that the District Court had misapplied *Montana*'s consensual-relationship exception. Pet. App. 8. But they did not argue that there were disputed questions of material fact. *Id.* In October 2013, a divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed. *Id.* at 2.[9]

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[9] The panel withdrew its original opinion and substituted a revised opinion, with minor changes, affirming the District Court's judgment. Pet. App. 1-2.

The panel majority's analysis centered on the framework established in *Montana* and its progeny. As the majority explained, this Court has identified "two exceptions to the general rule that Indian tribes cannot exercise civil jurisdiction over non-members." *Id.* at 4 n.1. Under the first *Montana* exception, "a tribe may regulate conduct that has a nexus to some consensual relationship between the non-member and the tribe or its members." *Id.*; *see id.* at 8-11. The majority readily identified a consensual relationship: Dollar General's agreement to participate in the YOP program, under which Doe was "essentially an unpaid intern, performing limited work in exchange for job training and experience." *Id.* at 12. There was, moreover, an "obvious nexus" between the conduct regulated through Doe's suit (Dollar General's placement of a manager in a business on Tribal land, who allegedly sexually assaulted an individual working there) and the consensual relationship (Dollar General's participation in the Tribe's YOP). *Id.* at 13. Ultimately, the Tribe was "attempting to regulate the safety of the child's workplace" and "protecting its own children on its own land." *Id.* at 13.

The majority also rejected Dollar General's claim that this Court's decision in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), had engrafted new jurisdictional prerequisites on *Montana*'s first exception. It refused to "require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'" Pet. App. 16 (quoting *Plains Commerce Bank*, 554 U.S. at 335) (alterations in original). It explained that under *Plains Commerce Bank*, it was enough that the suit

implicated the Tribe's general sovereign right to "regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land." *Id.*

Judge Smith dissented. *Id.* at 22. He argued that the relationship between Doe and Dollar General could not serve as a basis for tribal jurisdiction unless the relationship itself affected tribal self-government or internal relations. *Id.* at 24-25. Moreover, Judge Smith maintained, Dollar General could not have anticipated that its relationship with Doe would have subjected the company to "any and all tort claims actionable under tribal law," in the "unfamiliar forum" of the tribal courts. *Id.* at 31.

The Fifth Circuit denied petitioners' request for rehearing *en banc*. *Id.* at 93. Judge Smith filed a dissent joined by two other judges, in which he reiterated the arguments from his panel dissent. *Id.* at 93-94. This Court granted certiorari.

SUMMARY OF ARGUMENT

Thirty-four years ago, in its pathmarking decision in *Montana* v. *United States*, 450 U.S. 544 (1981), this Court affirmed that Indian tribes retain inherent sovereign authority to exercise a measure of civil jurisdiction over nonmembers. In the years since, this Court has clarified that nonmembers may be subject to a tribe's authority at least when two conditions are met: First, the exercise of jurisdiction must "stem from" the tribes' retained rights to "set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Second, the nonmember must have "consented [to jurisdiction] either expressly *or through his actions*." *Id.* (emphasis added).

This Court has further clarified that where a nonmember enters reservation land and engages in a "consensual relationship with the tribe or its members," those actions indicate consent to the exercise of tribal civil jurisdiction over disputes or claims with a "nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656. And, while *Montana* addressed civil regulatory jurisdiction, this Court has since confirmed that the case also "govern[s] tribal assertions of [civil] adjudicative authority." *Id.* at 652. That makes good sense given that sovereigns require an adjudicatory mechanism to effectively enforce their civil regulations, and given that tort claims, like those at issue in this case, are themselves a "form of regulation." *Plains Commerce Bank*, 554 U.S. at 332.

There is no real question that the Tribe's assertion of adjudicative jurisdiction in the underlying case is within the limits of a tribe's civil authority under *Montana*. The underlying litigation arises from allegations that petitioners' employee—the manager of a business located on Choctaw Reservation trust lands —sexually molested a Choctaw child working under his supervision as part of the Choctaw Youth Opportunity Program in which petitioners voluntarily agreed to participate. Those claims indisputably implicate the Tribe's sovereign interest in protecting its members on its land. And by agreeing to participate in that tribal program, petitioners consented to the exercise of tribal jurisdiction over a workplace sexual assault suit arising directly from that participation.

Petitioners offer only a token argument for why this case does not fit within the recognized bounds of the tribes' retained authority. Instead, petitioners devote the majority of their brief to the remarkable

assertion that tribes lack *all* adjudicative authority over nonmembers, based on this Court's holding that tribes lack *criminal* adjudicative jurisdiction over nonmembers in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). That argument is not even properly before the Court because petitioners did not raise it before the tribal courts and did not seek certiorari as to whether tribal adjudicative jurisdiction over nonmembers is completely foreclosed. In any event, this Court long ago held that "*Oliphant* does not apply" in the civil context. *Nat'l Farmers Union*, 471 U.S. at 854.

Criminal jurisdiction, the Court has explained, "involves a far more direct intrusion on personal liberties" than civil jurisdiction. *Duro* v. *Reina*, 495 U.S. 676, 688 (1990). Thus, while the Court has deemed the exercise of criminal jurisdiction to conflict with the overriding sovereign interests of the United States, a nonmember's consent suffices to avoid that conflict in a civil case. The "tribal courts" therefore retain the power to "resolve civil disputes involving nonmembers," *id.*, so long as the nonmember has "consented, either expressly or by his actions," *Plains Commerce Bank*, 554 U.S. at 337.

Petitioners provide nothing close to the compelling rationale required to overturn this settled precedent. *See Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014). They point primarily to inapposite treaties and long-superseded congressional pronouncements—sources *Oliphant* itself found insufficient to independently support its holding. The remainder of petitioners' arguments fare little better.

Petitioners worry that tort suits in particular will expose nonmembers to a host of esoteric and unpre-

dictable forms of tribal law. But under this Court's *Montana* framework and nexus requirement, a nonmember is subject only to tribal jurisdiction that he could reasonably anticipate, putting such fears to rest. And petitioners' concerns ring hollow in this case, where petitioners can hardly claim to have been unaware that their voluntary participation in a youth job-training program might expose them to suit for a sexual assault by their manager on a participating child under straightforward tort principles of negligence and supervisory liability.

In the end, petitioners' argument is predicated on the baseless assertion that tribal courts are unfit for nonmembers. The Choctaw Courts are representative in their commitment to providing every litigant with due process and a fair outcome. And, even if some other tribal court might fall short of these goals in a particular case, nonmembers have resort to a panoply of procedural safeguards. Most notably, state and federal courts may decline to enforce tribal judgments that infringe upon nonmember rights. *See, e.g.*, *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001) (refusing to enforce $2 million tribal court judgment against nonmember due to plaintiffs' "appeal[] to historic racial prejudices" during trial). And litigants may challenge tribal jurisdiction in federal court where a tribal court has asserted jurisdiction in "bad faith" or where that court is unable to offer the nonmember an "adequate opportunity" to litigate its claims. *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

Because the Tribe's assertion of civil jurisdiction here falls comfortably within the limits this Court has articulated, and because petitioners have offered no compelling reason to overturn entrenched prece-

dent and alter those limits, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. TRIBAL COURTS HAVE CIVIL ADJUDICATIVE JURISDICTION OVER NONMEMBERS WITHIN THE LIMITS RECOGNIZED BY *MONTANA* AND ITS PROGENY.

A. Under *Montana*, Tribes Retain A Measure of Civil Jurisdiction Over Nonmembers.

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester* v. *Georgia*, 31 U.S. 515, 557 (1832)). As "'a separate people, with the power of regulating their internal and social relations,'" the tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978) (quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886)); *see also Mazurie*, 419 U.S. at 558 ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations").

In its "pathmarking" decision in *Montana* v. *United States*, this Court confirmed that the tribes' retained powers include the right to "exercise some forms of civil jurisdiction over [nonmembers] on their reservations, even on non-Indian fee land." 450 U.S. at 565. Just three years earlier, in *Oliphant*, the Court had announced that tribes have been divested of their inherent authority to exercise criminal jurisdiction over nonmembers. The *Montana* Court acknowledged *Oliphant*'s holding, but concluded that the

tribes enjoy a broader range of inherent authority over nonmembers in the civil context. *Id.*

Subsequent case law has clarified that tribes may exercise authority over nonmembers when two conditions are met.

First, a tribe's authority derives from its rights "to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. A tribe's exercise of civil authority over a nonmember must therefore "stem from" one of these retained sovereign powers.

This condition is satisfied where a nonmember's conduct occurs on tribal land, because the tribe's jurisdiction is then rooted in its authority to set conditions on entry to that land. *See, e.g.*, *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997) ("readily agree[ing] that tribes retain considerable control over non-member conduct on tribal land"). And even where the conduct occurs on reservation land that is not owned by the tribe, this requirement is met when the exercise of tribal civil jurisdiction is necessary to preserve "tribal self-government" or to control "internal relations." *Plains Commerce Bank*, 554 U.S. at 337; *see also id.* (tribes may regulate activity on reservation land owned by non-Indians in order to vindicate the tribe's "sovereign interests in protecting its members and preserving tribal self-government").

Second, to avoid any conflict with the overriding sovereignty of the United States, a tribe may exercise civil jurisdiction over a nonmember "if the nonmember has consented, either expressly or by his actions." *Id.*

Montana described one of the primary ways in which a nonmember's "actions" may demonstrate consent to civil jurisdiction. The *Montana* Court explained that when a nonmember enters reservation land and engages in "consensual relationships with the tribe or its members," 450 U.S. at 565, that action indicates consent to any exercise of tribal jurisdiction that has a "nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656; *cf. Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001) (*Montana*'s first exception covers "private individuals who voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) enter[] into").[10]

That makes good sense: A nonmember who enters into an agreement with a tribe or tribal member that involves the nonmember engaging in activity on reservation land should reasonably anticipate that the tribe will exercise authority over conduct related to that agreement.[11]

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[10] *Plains Commerce Bank* suggested that nonmembers may also consent to civil jurisdiction where they engage in "noxious uses [of reservation land] that threaten tribal welfare or security," or in "conduct on the land that does the same." 554 U.S. at 336.

[11] *Montana* primarily concerned a tribe's authority to regulate nonmember conduct on reservation land that is *not* owned by the tribe. 450 U.S. at 566. By contrast, the Court "readily agree[d]" that the tribe *could* impose the hunting and fishing regulations at issue in that case on nonmembers who were on the tribe's own land. *Id.* at 557. *Montana* thus suggests that a nonmember may consent to a broader range of tribal jurisdiction when he enters land owned by the tribe than when he enters land owned by non-Indians within the reservation. *Cf. Hicks*, 533 U.S. at 360 ("ownership status of the land * * * may sometimes be a dispositive factor" in determining whether a

For example, in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court held that nonmembers could be subject to a tribal oil and gas tax imposed several years after the nonmembers entered into mineral lease agreements with the tribe. The Court rejected the assertion that the tax was invalid because the nonmembers had not explicitly consented to it in the lease agreements. *Id.* at 145-148. Rather, the tax was a legitimate exercise of the tribe's sovereign power over its land. *Id.* In other words, the nonmembers should have anticipated that by entering into the mineral leases, they were exposing themselves to assertions of tribal sovereignty over conduct related to those agreements. *See also Atkinson Trading Co.*, 532 U.S. at 649 (explaining that *Merrion* is best understood as a straightforward application of *Montana*).

B. *Montana* Governs Assertions Of Civil Adjudicative Jurisdiction Over Nonmembers.

While *Montana* itself concerned civil regulatory jurisdiction, this Court has since confirmed that "*Montana* [also] governs tribal assertions of [civil] adjudicative authority" over nonmember defendants. *At-*

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tribe has jurisdiction over a nonmember); Gov't Cert. Br. 11 (arguing that an exercise of tribal authority need not fit within one of the two *Montana* circumstances where the regulated conduct occurs on land owned by the tribe). Although the nonmembers' conduct in this case occurred on tribal land, the Court does not have to decide the question raised by the Solicitor General to affirm because respondents have (following the lead of the Choctaw Supreme Court, Pet. App. 84-87) otherwise established that tribal civil jurisdiction is warranted under *Montana's* first exception.

kinson Trading Co., 532 U.S. at 652 (citing *Strate*, 520 U.S. at 453); *see also Hicks*, 533 U.S. at 380 (Souter, J., concurring) ("In *Strate*, we expressly extended the *Montana* framework, originally applied as a measure of a tribes' civil regulatory jurisdiction, to limit tribes' civil adjudicatory jurisdiction.").

That is hardly surprising. Even before *Montana*, this Court suggested that a nonmember's decision to enter tribal land and interact with tribal members could entail consent to tribal adjudicative jurisdiction. In *Williams* v. *Lee*, 358 U.S. 218 (1959), the Court held that a nonmember storeowner doing business on tribal land could sue to collect on debts from his Indian customers only in tribal court. To be sure, the nonmember in *Williams* was a plaintiff. Nonetheless, the Court's holding meant that the nonmember could avoid tribal court jurisdiction only by forgoing the ability to vindicate his rights entirely. *Williams* thus foreshadowed *Montana* in its determination that a nonmember's conduct on tribal land could indicate consent to submit related disputes with tribal members to the tribal courts.[12]

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[12] Petitioners argue that *Williams* v. *Lee* is irrelevant because it involved a "Court of Indian offenses, established and ultimately controlled by the Federal Government," rather than a purely tribal court. Pet. Br. 51 n.34. Petitioners are simply wrong. *Williams* did not turn on (or even mention) the type of tribal court at issue. It relied instead on the "right of the Indians to govern themselves." 358 U.S. at 223. And this Court has reaffirmed the *Williams* holding in two later cases that involved tribes with tribally established courts. *See Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984) ("*Wold I*") ("permit[ting] North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians" would "intrude impermissibly on tribal self-government"); *Kennerly* v. *District*

Nor would it make sense for *Montana* to govern regulatory, but not adjudicative, jurisdiction. A tribe's ability to regulate will frequently depend on its ability to adjudicate. *See, e.g.*, *Wheeler*, 435 U.S. at 332 ("[T]ribal courts are important mechanisms for protecting significant tribal interests."). Tribal courts are the primary means of enforcing tribal laws and regulations. And, like their state and federal counterparts, tribal courts participate directly in the process of regulating by giving content to common law rules and offering authoritative interpretations of the legislative enactments they apply. *See Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Absent the power to adjudicate when they have the power to regulate, tribes would be forced to resort to the courts of another sovereign to give effect to their own laws, a situation inconsistent with any known conception of sqvereignty.

Further, given the extent to which regulatory and adjudicative jurisdiction overlap, it is illogical to assume that a nonmember's actions might indicate consent to one form of jurisdiction but not the other. That is particularly so with respect to tort law because tort litigation is a "form of regulation." *Plains Commerce Bank*, 554 U.S. at 332; *see also Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008).

Thus, while this Court has never had reason to affirm a tribal court's exercise of adjudicative jurisdic-

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Court, 400 U.S. 423, 426-428 (1971) (holding that *Williams* precluded Montana from exercising jurisdiction in case brought by nonmember against tribal defendants).

tion over a nonmember defendant, its cases nevertheless stand for the "unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)).

That is, tribes generally have the right to exercise civil adjudicative jurisdiction over a nonmember if that jurisdiction "stem[s] from the tribe's inherent sovereign authority" and the nonmember's "actions" indicate consent under the *Montana* framework. *Plains Commerce Bank*, 554 U.S. at 337.

II. THE UNDERLYING TORT SUIT FITS COMFORTABLY WITHIN *MONTANA*'S LIMITS.

Respondent Doe's lawsuit against petitioners falls within the heartland of tribal adjudicative jurisdiction under *Montana* and its progeny. Dollar General established a business on Tribal land pursuant to a lease agreement with the Tribe, and under a business license issued by the Tribe. It then agreed to take on a number of young tribal members as unpaid interns as part of an employment training program administered by the Tribe. Respondent Doe sued in Tribal Court because Dollar General's manager allegedly sexually assaulted him on the business premises during the course of this internship. If this case

does not fall within *Montana*'s limits, little, if anything, can.[13]

A. The Tribe's Assertion of Civil Jurisdiction Stems From Its Inherent Sovereign Powers.

There is no serious question that the Tribe's assertion of civil jurisdiction in this case is directed at "nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis omitted).

First, the acts alleged in Doe's complaint took place on tribal land. The Dollar General store in question occupied a leased lot in a tribally owned and managed shopping center on Choctaw Reservation trust land. *See* J.A. 28. And the complaint alleged that the assaults took place inside the store. *Id.* at 12-13.

Conduct on tribally owned land directly implicates a tribe's inherent sovereign interest in governing its territory. *See Plains Commerce Bank*, 554 U.S. at 332 (suggesting that regulations may be justified by a tribe's interest in controlling activities on the land it owns); *Mazurie*, 419 U.S. at 557 (tribes retain inherent "sovereignty over both their members and their *territory*" (emphasis added)). *Montana* itself recognized that a tribe may have the authority to place conditions on nonmembers' entry onto tribally owned land, over and above the authority tribes have

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[13] *Montana* also recognized that a tribe may exercise civil jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Respondents do not rely upon *Montana*'s second exception in this case.

to regulate nonmember conduct on reservation land in general. 450 U.S. at 557.

Tribal civil jurisdiction over nonmembers is therefore at its zenith when the tribe acts both as a landowner and a sovereign. *Merrion*, 455 U.S. at 144-151. For example, in *Strate*, this Court "'readily agree[d],' in accord with *Montana*, that tribes retain considerable control over non-member conduct on tribal land." 520 U.S. at 454 (citation omitted). The Court went on to hold that the tribe had no jurisdiction over the underlying litigation only after concluding that the accident that gave rise to the lawsuit occurred on land over which the tribe lacked "a landowner's right to occupy and exclude," and *Montana*'s limits were not otherwise satisfied. *Id.* at 456.

Similarly, in *Hicks*, the Court observed "there was little doubt that the tribal court [in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999)] had jurisdiction over [tribal tort] claims" arising from a nonmember's mining operations on tribal land. 533 U.S. at 368; *see Neztsosie*, 526 U.S. at 482 n.4 (distinguishing *Strate* on the ground that "the events in question here occurred on tribal lands"); *cf. id.* at 488 (remanding to permit the district court to determine whether plaintiffs' claims were preempted by federal statute).

The fact that Doe's complaint revolves around conduct that occurred on tribal land thus makes it very clear that the Tribe's sovereign interests are at stake.

Second, even if the underlying sexual assault had taken place on *non*-Indian land within the reservation, the Tribe's sovereignty would still be deeply affected. In *Plains Commerce Bank*, the Court ex-

plained that "[t]he logic of *Montana* is that certain activities on non-Indian fee land (*say, a business enterprise employing tribal members*) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." 554 U.S. at 334-335 (emphasis added).

That describes this case. *See* Pet. App. 13 (treating Doe as a "quasi-employ[ee]"); C.A. App. 320 (arguments of counsel for Dollar General that Doe's intern status was analogous to employment). The Choctaw government would be a toothless one indeed if it could not regulate working conditions for tribal members and protect those members, including its most vulnerable youth, against blatant acts of sexual assault in the workplace. *See* 25 U.S.C. §3601(5) ("Tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."); *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 49 (1989) (" 'There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.' " (quoting 25 U.S.C. § 1901(3))).

Moreover, *Plains Commerce Bank* also states that, even with respect to non-Indian fee land, a tribe "may quite legitimately seek to protect its members from noxious uses [of the land] that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." 554 U.S. at 336. That is precisely what the Tribe is doing in this case: exercising jurisdiction to enforce a tort law designed to protect its members from threats to their welfare from both members and nonmembers alike.

The Choctaw Courts' adjudication of Doe's claims thus implicates the core of the Tribe's "'inherent [sovereign] powers * * * which ha[ve] never been extinguished.'" *Wheeler*, 435 U.S. at 322 (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945)).

B. Petitioners' Actions Indicate Consent To Tribal Civil Jurisdiction.

Petitioners do not seriously dispute that this case implicates the Choctaw's significant sovereign interests. Instead, petitioners claim "there is no basis" to conclude that Dollar General "consented, expressly or by implication, to the tribal jurisdiction asserted in this case." Pet. Br. 45. That is false.

As explained, entering into a consensual relationship with the tribe is enough to indicate consent to an exercise of civil jurisdiction with a "nexus" to that consensual relationship. *Atkinson Trading Co.*, 532 U.S. at 656. Under that test, petitioners "voluntarily submitted" themselves to Tribal Court adjudication of the YOP-related claims in Doe's complaint. *See Hicks*, 533 U.S. at 372.

1. Petitioners' relations with the Choctaw Tribe and Doe himself encompassed several written and oral agreements. Most important was petitioners' agreement to take Doe on as an unpaid intern through the YOP.

Petitioners' participation in the YOP was precisely the kind of consensual arrangement *Montana* contemplates: Doe provided Dollar General with uncompensated labor. Pet. App. 5, 45-46. And, in exchange, petitioners agreed to supervise and train Doe, giving him valuable job skills and helping the Tribe advance its broader goal of providing for its

young people. *Id.* Had petitioners properly screened and supervised their manager, the arrangement would presumably have benefited petitioners' reputation and standing in the Choctaw community, as well.

Petitioners protest that "there was no contract governing Dollar General's acceptance of Doe's placement in the store." Pet. Br. 45. That is both irrelevant and misleading. First, *Montana* is not limited to contracts; it contemplates a range of consensual relationships, including "commercial dealing, contracts, leases, *or other arrangements*." 450 U.S. at 565 (emphasis added); *Hicks*, 533 U.S. at 372.

Second, the record shows that the parties *had* a contract, even if it was not in writing. First, the District Court found that petitioners' manager agreed on petitioners' behalf to participate in the YOP. *See* Pet. App. 45-46; J.A. 66 (deposition testimony). The record thus shows that the parties had an express oral contract regarding Dollar General's participation in the YOP. *See, e.g.*, Restatement (Second) of Contracts § 4 (1981). Moreover, the parties' actions gave rise to a hornbook example of an implied contract no less binding than an express agreement. *See Hercules Inc.* v. *United States*, 516 U.S. 417, 423-424 (1996); 1 *Williston on Contracts* § 1:5 (4th ed.). After the manager "agreed to participate in the YOP," the Tribe assigned Doe and other Tribal students to report for work there. Pet. App. 3, 5; J.A. 66. Petitioners' manager supervised Doe and the other interns and was responsible for evaluating their performance. J.A. 60, 72. The Tribe, in turn, assisted in oversight, conducting on-site visits, reviewing Dollar General's timesheets for the interns, and counseling the interns on their job performance. J.A. 62, 72-73;

C.A. App. 927-931. In other words, the parties agreed to be bound as surely as if they had executed a written agreement.

2. Petitioners' voluntary participation in the YOP implied their consent to tribal jurisdiction over claims like Doe's. In *Plains Commerce Bank*, this Court suggested that the requisite nexus to support implied consent exists if the nonmember could "reasonably have anticipated" that entering into the consensual relationship would subject him to the exercise of tribal jurisdiction in question. 554 U.S. at 338. Petitioners cannot seriously argue that they were unable to anticipate that, by agreeing to take on a Tribal youth to work in a store operating on Tribal land through a Tribal program, they might face Tribal jurisdiction for the alleged sexual assault of that child by their employee. *See* J.A. 87 (setting forth petitioners' policy on sexual harassment).

Moreover, petitioners' agreement to take Doe on as an intern was just one of several arrangements with the Tribe. Petitioners possessed a Tribal business license and paid a business tax as a condition of carrying on their business on the Reservation. Pet. App. 76-77; Choctaw Tribal Code § 14-1-4(1). And petitioners' lease agreement with the Tribe included choice-of-law and forum-selection clauses expressly consenting to Tribal jurisdiction for lease-related disputes. *See* J.A. 47-48 ("Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians."). The lease also expressly stated that Dollar General "acknowledges that the demised premises and the afore-mentioned ground lease *are upon land held in Trust by the United States of America for the Mississippi Band of Choctaw Indians.*" *Id.* at 49 (emphasis added).

While the Court need not decide whether the license or the lease themselves support the exercise of jurisdiction in this case, at a minimum they demonstrate petitioners' willingness to submit to Tribal regulation in connection with their business operations, and petitioners' deliberate decision to conduct business on tribal trust land.

Moreover, because petitioners agreed that Tribal law would govern their lease-related disputes, they cannot reasonably argue that they were unaware of the contents of the Choctaw Tribal Code, which includes—for example—a provision extending the Tribal Court's jurisdiction over any individual or business entity "commit[ting] a tortious act or engag[ing] in tortious conduct within the Choctaw Indian Reservation, either in person or by an agent or representative." Choctaw Tribal Code § 1-2-3 (1), (2)(g). And petitioners' agreement to the lease's forum-selection clause shows that the petitioners had no general objection to the fairness or integrity of the Choctaw courts. Indeed, if petitioners actually believed the invective that permeates their brief, they should presumably have pursued their counsel for malpractice in connection with the lease's forum-selection provisions.

In short, by establishing a Tribally licensed business on Tribal property and agreeing with the Tribe to take Doe on as an intern at the Tribe's expense, petitioners manifested their consent to Tribal jurisdiction over claims that the agent charged with supervising Doe's work sexually assaulted him on store premises during business hours. *See* J.A. 13-14.

Respondents' claims thus satisfy the two major requirements for an exercise of tribal civil jurisdiction

over a nonmember under *Montana's* first exception: The jurisdiction arises from the Tribe's retained sovereign authority to regulate nonmember conduct on tribal lands, and the nonmembers' actions there indicate consent to jurisdiction.

III. FOR DECADES, THIS COURT HAS HELD THAT THE CIVIL JURISDICTION OF TRIBAL COURTS IS BROADER THAN THEIR CRIMINAL AUTHORITY AND THESE DECISIONS SHOULD NOT BE OVERRULED.

Faced with the overwhelming difficulty of proving that this case does not support tribal jurisdiction under *Montana*, petitioners instead make an even bolder claim. They argue that "the same * * * considerations of the United States' overriding sovereignty that led this Court to conclude that tribal courts lack *criminal* jurisdiction over nonmembers in *Oliphant* * * * make clear that tribes likewise have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court." Pet. Br. 16.

But this Court has *already held* that *Oliphant*'s bar on tribal criminal jurisdiction does not extend to civil cases. Probably for that reason, petitioners did not make this broad claim when challenging jurisdiction in the tribal courts. Nor did they seek certiorari review on the question of whether tribes retain any civil adjudicative authority over nonmembers. Instead, in the tribal courts petitioners argued only that this case did not fit within parameters of tribal jurisdiction under *Montana* and its progeny. *See* C.A. App. 134-143. And before this Court, petitioners presented only the question of "whether Indian tribal courts

have jurisdiction to adjudicate civil *tort* claims against nonmembers * * * ." Pet. i (emphasis added).

Petitioners may not change horses midstream. Nonmembers are required to exhaust all of their arguments against tribal jurisdiction in the tribal courts. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 856; *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16-17 (1987). Moreover, this Court has refused to hear arguments raised in an attempt to alter the question presented, cautioning that permitting counsel "who appear before us to alter these questions" would interfere with "the integrity of the process of certiorari." *Taylor* v. *Freeland & Konz*, 503 U.S. 638, 646 (1992).

Even if the contention that *Oliphant* bars all civil adjudicative jurisdiction over nonmembers was properly before the Court, it would still fail. It is directly contrary to this Court's precedent and petitioners offer no convincing reason why the Court should revisit its prior holding.

A. This Court Has Considered And Rejected Petitioners' Argument That *Oliphant* Extends To Civil Jurisdiction.

Six years after *Oliphant*, this Court was asked to extend *Oliphant*'s limitations to civil adjudication. It declined. Instead, the Court held that "the power to exercise civil subject-matter jurisdiction over non-Indians * * * is not automatically foreclosed, as an extension of *Oliphant* would require." *Nat'l Farmers Union*, 471 U.S. at 855. Lest there be any doubt, the Court reiterated two years later that, "[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction

is not similarly restricted." *Iowa Mutual*, 480 U.S. at 15 (citation omitted; emphasis added).

That conclusion was necessary to the judgments in both cases. Both *National Farmers Union* and *Iowa Mutual* concerned whether a nonmember defendant in a tort suit must exhaust her remedies in tribal court before challenging the tribe's jurisdiction in federal court. The Court recognized that "if [it] were to apply the *Oliphant* rule * * *, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians." *Nat'l Farmers Union*, 471 U.S. at 854. The Court's holding that exhaustion was required thus relied on its conclusion that "*Oliphant* does not apply." *Id.*

The Court more fully articulated the rationale for its exhaustion holdings in *Duro*. It was obvious to the *Duro* Court that "our decisions recognize broader retained tribal powers outside the criminal context," including the power of tribal courts to "resolve civil disputes involving nonmembers." 495 U.S. at 687. Tribal civil adjudicative authority is broader, *Duro* explained, because "[c]riminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe." It therefore represents a "far more direct intrusion on personal liberties" than civil jurisdiction does. *Id.* at 688. Thus, while *Duro* deemed tribal criminal jurisdiction over nonmembers to conflict with the sovereign interests of the United States, civil jurisdiction within *Montana*'s limits does not. *Id.*

In the face of precedent directly rejecting their main premise, petitioners point to a footnote in *Hicks* observing that this Court has "never held that a

tribal court had jurisdiction over a nonmember defendant," and a statement in *Strate* cautioning against an overly broad reading of the exhaustion precedent. Pet. Br. 23-24.

The footnote in *Hicks* merely states a fact: this Court has not yet had occasion to explicitly affirm an exercise of tribal adjudicative jurisdiction over a nonmember defendant.[14] That is because, since *National Farmers Union* and *Iowa Mutual*, this Court has confronted challenges to a tribe's adjudicative authority only in cases in which either the tribe lacked the authority to regulate the underlying nonmember activity, or a federal statute stripped the tribe of jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 330 ("the Tribal Court lacks jurisdiction * * * because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land"); *Hicks*, 533 U.S. at 374 ("because the [tribe] lacked legislative authority [to regulate the conduct of a state officer within the reservation] * * * they also lacked adjudicative authority); *Neztsosie*, 526 U.S. at 482 n.4, 487-488 (recognizing that the tribe likely had jurisdiction over tort claims arising from nonmember's uranium enrichment activities on tribal land, but holding that jurisdiction might have been removed by federal statute); *Strate*, 520 U.S. at 456-459 (rejecting tribe's assertion of adjudicative authority in a

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[14] Of course, the Court has affirmed the right of a tribal court to exercise exclusive jurisdiction over nonmember *plaintiffs*, without expressing any reservations about the counterclaims that would be adjudicated against nonmembers in tribal courts as a result. *See Williams*, 358 U.S. at 223; Part I.B, *supra*, at 23-25. *Cf.* Choctaw R. Civ. P. 13(a)-(f) (articulating Choctaw counterclaim rules).

suit arising from nonmember activity on a public right of way through reservation land because it failed to "qualif[y] under one of *Montana*'s exceptions").

Thus, the *Hicks* statement is true as far as it goes, which is not far at all. After all, *National Farmers Union* and *Iowa Mutual* are predicated on the holding that tribal adjudicative jurisdiction is proper in appropriate cases. Indeed, *Strate* itself explained that the exhaustion cases stand for "the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (internal quotation marks omitted).

National Farmers Union and *Iowa Mutual* were decided almost thirty years ago. This Court would scarcely have condemned three decades of nonmember defendants to toil in tribal courts (which, if anything, were less developed then) if those courts were categorically incapable of exercising jurisdiction. Indeed, this Court has repeatedly observed that exhaustion is not required where "it is plain" the tribal courts lack jurisdiction. *Hicks*, 533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459). Yet exhaustion remains the default rule precisely because—in the civil context—the absolute jurisdictional bar of *"Oliphant* does not apply." *Nat'l Farmers Union*, 471 U.S. at 854.

B. Petitioners Offer No Convincing Rationale For Upsetting This Court's Settled Precedent.

Because this Court has already determined that *Oliphant* is no obstacle to civil jurisdiction, petition-

ers must offer an extraordinarily compelling reason to adopt a contrary rule. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2028 (declining to change course on a question of Indian sovereignty on *stare decisis* grounds).

This Court approaches any reassessment of its precedent "with the utmost caution." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). And "'any departure' from the doctrine" of *stare decisis* "'demands special justification.'" *Bay Mills*, 134 S. Ct. at 2036 (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)). That is all the more true where, as here, "Congress exercises primary authority in this area and 'remains free to alter what [the Court] has done'—another factor that gives 'special force' to *stare decisis*." *Id.* (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). Petitioners thus bear the heavy burden of showing that the rule the Court adopted in *National Farmers Union* and *Iowa Mutual*, and reiterated in *Duro*, has "produce[d] unworkable law," and could be abandoned without "substitut[ing] disruption, confusion, and uncertainty for necessary legal stability." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008). They have not come close.

1. Petitioners begin with a lengthy examination of treaties and statutes from the nineteenth century, which they claim support their argument by implication. These sources were, of course, available to the Court when it decided the exhaustion cases, so they hardly qualify as compelling reasons for revisiting that precedent. And the Court specifically distinguished much of the same evidence in *National Farmers Union*, noting that both the executive materials and statutes relied on in *Oliphant* differentiat-

ed between civil and criminal jurisdiction. *See* 471 U.S. at 854-855.

Petitioners nevertheless argue that *National Farmers Union* endorsed their foray into amateur law-office history when it noted that "the existence and extent of a tribal court's jurisdiction will require a * * * detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-856. But it is clear in context that this language describes the inquiry a tribal court (or later a federal court) must undertake to assess a tribe's jurisdiction in a particular case. That is, the tribal courts must on a case-by-case basis "evaluate the factual and legal bases" for each challenge to their jurisdiction. *Id.* at 856. *National Farmers Union* was certainly not articulating a general analysis to be completed once, in the abstract, with the conclusion that no tribe has any civil jurisdiction whatsoever. After all, the Court in that very case undertook that general analysis and reached the opposite conclusion.[15]

Treaties and statutes are therefore relevant to this case only to the extent they establish whether or not the respondent Tribe has been stripped of jurisdiction over the claims at issue. And petitioners have

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[15] Inexplicably, throughout their discussion of the historical sources, petitioners cite Justice Souter's concurrence in *Hicks*. But that concurrence reaffirmed that tribes *do* have civil adjudicative authority within *Montana*'s limits. *See, e.g.*, *Hicks*, 533 U.S. at 379 & n.3 (citing, *inter alia*, *Montana*'s consensual relationship exception, as the reason "it is true that tribal courts' civil subject matter jurisdiction over non-Indians is not automatically foreclosed, as an extension of *Oliphant* would require" (internal quotation marks omitted)).

not identified any source that deprives this Tribe of civil jurisdiction over this case.

a. It is self-evident that treaties bind only their signatories. Petitioners identify *no* treaty with the Mississippi Choctaw that withdraws their civil jurisdiction, and there is none. Instead, petitioners misleadingly refer (at 24-26) to several "Choctaw" treaties, executed with a *different* tribe.

The United States entered into the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1831), and the treaties that followed, with the tribe known today as the Choctaw Nation of *Oklahoma*. *See generally United States* v. *John*, 437 U.S. 634, 638-647 (1978); *Winton* v. *Amos*, 255 U.S. 373 (1921). The respondent Tribe is the *Mississippi* Band of Choctaw Indians, which comprises Choctaws who resisted removal to the western territories in the nineteenth century and who eventually achieved recognition as a separate tribe in 1945. *See supra* 3; *John*, 437 U.S. at 642-646; Act of June 21, 1939, 53 Stat. 851 (1939) (providing for acquisition of trust lands). Respondents are strangers to the Choctaw treaties cited by petitioners. Indeed, the last time a party argued to this Court that the 1830 treaty defines the rights of the *Mississippi* Band of Choctaw Indians, the Court remarked that the "argument may seem to be a cruel joke to those familiar with the history of the execution of that treaty, and of the treaties that renegotiated claims arising from it." *John*, 437 U.S. at 653.

In any event, petitioners' argument that the treaties never "implicitly granted tribes civil jurisdiction" gets the inquiry exactly backwards. Pet. Br. 26. The tribes retain "those aspects of sovereignty *not withdrawn* by treaty or statute, or by implication as a

necessary result of their dependent status." *Wheeler*, 435 U.S. at 322-323 (emphasis added). Petitioners point to nothing that withdraws this Tribe's sovereign civil authority.

b. Petitioners' statutory evidence suffers from the same flaw. This Court recently reiterated that "unless and until Congress acts, the tribes retain their historical sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). At the same time, it emphasized that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2032. But petitioners point to *no* statute, currently in force, that withdraws the tribes' civil adjudicative power.

Whatever Congress may have intended in the brutal years of Indian removal and westward expansion, the consistent federal policy of the last 80 years has been to recognize and reinforce inherent tribal sovereignty. *See, e.g.* Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*; Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*; Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601, *et seq.*; Indian Tribal Justice and Technical Assistance Act of 2000, 25 U.S.C. § 3651, *et seq.*; Tribal Law and Order Act of 2010, tit. II, Pub. L. No. 111-211.

In fact, when this Court held that *Oliphant* bars criminal jurisdiction over nonmember *Indians*, *see Duro*, 495 U.S. at 684, Congress quickly passed legislation recognizing that "Indian tribes" have the "inherent power * * * to exercise criminal jurisdiction over all Indians," including nonmembers. 25 U.S.C. § 1301(2); *see also United States* v. *Lara*, 541 U.S. 193, 197-198 (2004). And Congress has expressly abrogated *Oliphant* in domestic violence cases, explain-

ing that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over *all* persons." 25 U.S.C. § 1304(b)(1) (emphasis added). Given Congress' willingness to limit *Oliphant*'s effect on tribal *criminal* jurisdiction, it is hard to swallow petitioners' assertion that Congress nevertheless understands a tribe's inherent *civil* jurisdiction to be limited to its members.

In the end, *Oliphant* concluded that the treaties and statutes it examined "would probably not be sufficient to remove criminal jurisdiction over non-Indians if the [Suquamish Tribe] otherwise retained such jurisdiction." 435 U.S. at 208. Rather, the Court held that the Suquamish lacked criminal jurisdiction over nonmembers primarily because that jurisdiction "conflicted with the interests of [the federal government's] overriding sovereignty." Petitioners' even weaker historical evidence regarding tribal civil jurisdiction fares no better.

2. Petitioners' next gambit is to argue that civil adjudicative jurisdiction *also* conflicts with the United States' "overriding sovereignty." Petitioners face an uphill battle, given that the United States Government (which undoubtedly has the most authoritative understanding of its own sovereignty) filed an amicus brief at the certiorari stage *supporting* tribal jurisdiction in this case. Petitioners rely primarily on this Court's opinion in *Duro*. *See* Pet. Br. 41-46. But, as noted, *Duro* itself observed that tribes retain the power to "resolve civil disputes involving nonmembers" because civil jurisdiction represents a far

less "direct intrusion on personal liberties" than does criminal. 495 U.S. at 686-688.[16]

Moreover, the *Plains Commerce* Court considered the very factors that had earlier led the Court to conclude that tribal criminal jurisdiction is incompatible with the sovereign interests of the United States—that Tribes are sovereigns operating outside the "basic structure of the Constitution," to whom the "Bill of Rights does not apply." 554 U.S. at 337. But the Court held that, in the civil context, these concerns do not obtain where the nonmember has "consented" to the tribe's jurisdiction "either expressly or by his actions." *Id.*

In the end, petitioners do not even deny that a tribe may exercise civil jurisdiction over a nonmember who has consented, something that would presumably be impossible if the exercise of such jurisdiction were truly at odds with the sovereignty of the United States. Petitioners allege only that any consent

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[16] Petitioners intimate that where a civil suit involves punitive damages, this distinction is invalid. Pet Br. 19. Not so. The *Duro* Court observed that criminal adjudications represent a greater intrusion on personal liberties because they expose the defendant to the "prosecuting power of the tribe." 495 U.S. at 688. Civil suits between private parties do not implicate the same concern; that is one of the main reasons the Eighth Amendment does not apply to punitive damages. *See BFI, Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 275 (1989); *see also, e.g., In re Winship*, 397 U.S. 358, 367 (1970) (observing that the "stigma" of a criminal conviction is part of the reason that the reasonable doubt standard is required in criminal—but not civil—trials). In any event, petitioners' argument would at most suggest that tribal courts lack the power to impose punitive damages on nonmembers; it would not foreclose tribal adjudicative jurisdiction altogether.

must be "unambiguous." Pet Br. 23. But petitioners have no rationale for this requirement, which runs contrary to *Montana* and all of this Court's subsequent case law holding that an "action[]"—including the act of entering into a "consensual relationship" with the tribe or its members—is sufficient to indicate consent to tribal civil jurisdiction over suits which have a nexus to that action.

This precedent, unlike petitioners' novel proposal, has a clear rationale: When a nonmember engages in a consensual relationship with the tribe on reservation land (and particularly on tribal land) the nonmember has fair notice that he may be subject to tribal jurisdiction on matters having the requisite nexus to that relationship and should reasonably anticipate it. Indeed, this is analogous to basic principles underlying the *International Shoe* "minimum contacts" test applicable to interstate jurisdiction, *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), although tribal jurisdiction under the *Montana* framework is more limited. *Plains Commerce Bank,* 554 U.S. at 337.

3. As a last resort, petitioners contend that this Court should extend *Oliphant* for some policy reasons. They observe that Congress can always confer civil adjudicative authority on tribes, if it so chooses, and Congress can adopt a more tailored approach than this Court. Pet. Br. 41-42. While there is no question that Congress could confer civil adjudicative authority on tribes, that authority already exists. And Congress does not need a ruling from this Court to enact the jurisdictional limitations that petitioners suggest (at 40-41). Congress has not done so, despite the fact that this Court declined to extend *Oliphant* to the civil context almost thirty years ago. Its si-

lence speaks volumes, particularly when compared to the speed with which Congress *expanded* tribal criminal jurisdiction when it viewed the Court's holding in *Duro* as overly restrictive. *See Lara*, 541 U.S. 193, 197-198.

In short, petitioners have offered nothing close to the extraordinarily compelling rationale necessary to persuade this Court to overturn its holding that *Oliphant* does not apply in the civil context.

C. The Existence of *Oliphant* Counsels In Favor Of Maintaining Tribes' Civil Adjudicative Jurisdiction.

Contrary to petitioners' claims, the fact that *Oliphant* deemed criminal jurisdiction over non-Indians to be implicitly divested is a reason to carefully guard the limited civil adjudicative powers that tribes do possess. This Court has long held that the right to "make their own laws and be ruled by them" is central to the tribes' retained sovereign powers. *Hicks*, 533 U.S. at 361 (citing *Williams*, 358 U.S. at 220). This right is seriously threatened where tribes are unable to offer a forum in which their members may obtain relief when nonmembers transgress the tribe's laws. *See, e.g.*, 25 U.S.C. § 3601(5) ("Tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.")

Petitioners argue that there is no affront to tribal sovereignty because tribes may simply rely on the courts of other sovereigns in order to enforce their laws and regulations. Petitioners are wrong. Because courts interpret and apply laws as they enforce them, under petitioners' proposal, the meaning and application of tribal laws will differ depending on

whether or not a defendant is a member of the tribe. This unequal enforcement will undermine the integrity of tribal law in general. Moreover, forcing injured tribal members to leave their home communities to seek redress against nonmembers in the courts of an entirely separate sovereign inevitably undermines the tribal government's ability to enforce its own laws.

Petitioners' proposed solution also forces a tribal member who has already been harmed by a tribal outsider to seek relief outside the reservation, potentially exacerbating his injury and making it more likely he will forgo redress altogether. This case dramatically illustrates the problem: Sexual assault victims, and particularly minor victims, are understandably reluctant to press suit because the adjudicative process frequently forces a painful confrontation with the aggressor. The minor victim in this case may therefore have chosen to litigate only because he was able to do so within the familiar forum of his Tribal Court.

Nor is it clear that a tribe will always be able to enforce its laws against nonmembers in state or federal court. While these courts may have the power to apply tribal law in cases that otherwise come under their jurisdiction, there will inevitably be cases that can meet neither federal nor state jurisdictional requirements.

Petitioners contend that a tribe's power to exclude can fill this gap. But if a tribe is reduced to excluding every nonmember who transgresses tribal law, reservation lands may quickly be emptied of many nonmembers. Or—more likely—nonmembers, and in particular nonmember businesses, will be able to

commit all but the most severe violations of tribal law with impunity, free in the knowledge that the tribe is unlikely to jeopardize its economic welfare by expelling them entirely.

Thus, the fact that *Oliphant* deemed tribes divested of criminal jurisdiction over non-Indians means it is all the more important that tribes retain some civil adjudicative authority in that realm. Otherwise, the tribes will be unable to fully vindicate their undisputed right to "make their own laws and be governed by them." *Hicks*, 533 U.S. at 362.[17]

IV. PETITIONERS' REMAINING ARGUMENTS ARE UNAVAILING.

A. Tribes May Regulate Nonmember Conduct Through Tort Law.

As a fallback, petitioners contend that tort law is not a permissible means of regulating nonmember conduct under *Montana*. Pet. Br. 47-54. That contention, too, runs headlong into this Court's precedent, which has assumed that tort law is no different from other forms of tribal regulation. *See Plains Commerce Bank*, 554 U.S. at 331-332; *Hicks*, 533 U.S. at 368 (noting there was "little doubt that the tribal court" in *Neztsosie* "had jurisdiction over [tribal] tort claims" against nonmembers); *Neztsosie*, 526

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[17] That is not to say that a tribe or its members should be precluded from bringing suit in state or federal court. *See Wold I*, 467 U.S. at 148-149 ("As a general matter, tribal self-government is not impeded when a state allows an Indian to enter its court on equal terms with other persons to seek relief against a non-Indian."). But, to avoid the impingement on tribal sovereignty, the choice must be in the hands of the tribe or its members.

U.S. at 482 n.4 (assuming that tribal courts would have jurisdiction to hear tribal tort claims against nonmembers for conduct on tribal land).

Undeterred by this precedent, petitioners claim that nonmembers cannot implicitly consent to tort jurisdiction because tort law is typically unwritten and it is difficult to determine its precise contours *ex ante*. If that were true, much of state tort law would be invalid. The Due Process Clause mandates that "all regulated parties should know what is required of them so they may act accordingly." *FCC* v. *Fox*, 132 S. Ct. 2307, 2317 (2012) (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)). Yet state tort law has survived because, while it is uncodified, parties are typically able to predict how to adjust their behavior in order to avoid tort liability.

To the extent petitioners are suggesting that tribal tort law in particular is unpredictable, that concern is already accounted for in this Court's precedent. As noted, under the nexus requirement, a nonmember's agreements with the tribe indicate consent only to an exercise of tribal jurisdiction that he can reasonably anticipate. If a nonmember were asked to defend himself against an entirely novel tribal tort with no analogue in the Anglo-American system, *then* the nonmember *might* be able to demonstrate that consent was absent. *Cf. Plains Commerce Bank*, 554 U.S. at 338 (questioning the defendant's ability to anticipate the "novel" tribal tort at stake). But that is not a reason to bar tribal tort jurisdiction in general.

Nor is it a reason to bar jurisdiction in this particular case. Petitioners must have been aware that tribal law might impose a duty to protect the tribe's minor intern from sexual assault by his manager.

The claims against petitioners are the stuff of 1L Torts. *See* Restatement (Second) of Torts § 18 (1965) (Battery: Offensive Contact); *id.* at § 21 (Assault); *id.* at § 46 (Outrageous Conduct Causing Severe Emotional Distress); *id.* at § 317 (Duty of Master to Control Conduct of Servant). Indeed, respondent Doe's claims were borrowed directly from Mississippi law pursuant to Section 1-1-4 of the Choctaw Tribal Code, which mandates that state law will apply in the absence of on point tribal or federal law.

Petitioners' only other rationale for excluding tort law from tribal jurisdiction is their contention that, unlike other forms of regulation, tort law is pervasive. Pet. Br. 55. Whether or not that is true, it is irrelevant. A nonmember will not be subjected to the full panoply of tribal tort law. Rather, a nonmember is subject to tort law only to the extent the requirements set out in *Montana* and its progeny are satisfied. And again, there is no question those requirements are satisfied by *this* exercise of tort jurisdiction: It has a clear nexus to petitioners' consensual relationships with the tribe and its members, and it involves the regulation of nonmember conduct that took place on tribal land and that implicates the Tribe's core right to protect its members.

B. Petitioners' Unfounded Attacks On Tribal Courts Ignore The Numerous Procedural Safeguards Available To Litigants.

Ultimately, petitioners' objection to tribal jurisdiction over Doe's claims rests on little more than a facial attack on the competence of tribal courts. This Court has soundly rejected similar arguments as contrary to federal policy. *See Iowa Mut.*, 480 U.S. at 19. And it has "repeatedly" recognized tribal courts

"as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978); *see Wheeler*, 435 U.S. at 332 ("[T]ribal courts are important mechanisms for protecting significant tribal interests."); *Fisher* v. *Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387-388 (1976) (per curiam). Indeed, those forums are the first line of defense in the protection of litigants' due process rights. *See Martinez*, 436 U.S. at 67-72.

1. Congress, too, has recognized the central importance of the tribal courts and taken steps to build their capacity and expand their authority. For example, in 1993 Congress passed the Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq.*, which created the Office of Tribal Justice Support and provided federal funding to assist in training and providing support to tribal judiciaries. The Act's statutory findings explained that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." *Id.* § 3601(5). They further noted that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." *Id.* § 3601(6). And the Senate Report accompanying the Act explained that this language "was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and *non-Indian individuals*." S. Rep. No. 103-88, at 8 (July 15, 1993) (emphasis added).

Congress expanded on the 1993 Act with the Indian Tribal Justice and Technical Assistance Act of 2000, 25 U.S.C. § 3651, *et seq.*, which further contributed to the courts' institutional capacity and encouraged their integration into regional and national networks of judicial professionals, and again with the Tribal Law and Order Act of 2010, tit. II, Pub. L. No. 111-211.

Congress has expressed support for tribal adjudicative authority in other ways, as well. Significantly, it has required State and federal courts to grant full faith and credit to certain tribal court orders, *including orders involving nonmembers*. *See* 18 U.S.C. § 2265(e) (recognizing that tribal courts may issue protective orders against "any person," and that such orders may be enforced through "civil contempt proceedings," and are entitled to full faith and credit in state courts); 25 U.S.C. § 1911 (tribal courts have exclusive jurisdiction over certain custody proceedings involving Indian children, and orders relating to such proceedings entitled to full faith and credit); 25 U.S.C. § 3106 (granting full faith and credit to tribal court judgments regarding trespass to tribal lands, including with respect to non-Indian defendants, *see* 25 C.F.R. 163.29, and providing for concurrent jurisdiction with the federal courts).

In 2013, Congress also authorized tribal courts to extend their *criminal* jurisdiction over non-Indian perpetrators of domestic violence in Indian country, asserting that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). Congress has thus consistently recognized the power of tribal

courts to exercise their adjudicative authority over members and nonmembers alike.

Given that the Solicitor General has also rejected petitioners' policy concerns about tribal courts, *see* Gov't Cert. Br. 19-20, petitioners' contention that the weakness of the tribal courts should foreclose jurisdiction over nonmembers is directly contrary to the determinations of *both* political branches.

Finally, it is notable that petitioners do not allege that *they* were deprived of due process or suffered any other unjust treatment at the hands of the Choctaw courts. Nor could they. Petitioners enjoyed full and fair proceedings in the Tribal justice system, which operates under a constitution that guarantees equal protection and due process to "any person within its jurisdiction." Choctaw Const. art. X, § 1(h). Their objections to the Tribe's jurisdiction were heard in the first instance by a law-trained judge applying the protections of the Indian Civil Rights Act. They then exercised their right to interlocutory review before the Tribe's Supreme Court, which rendered a thorough, fair, and thoughtful opinion applying this Court's precedents. Pet. App. 75-91.

2. Petitioners therefore raise only the specter that *other* tribal courts may not be so sophisticated or fair. But there are already a range of procedural protections in place should that specter materialize.

First, this Court has stated that a nonmember need not even exhaust his tribal remedies if "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Nat'l Farmers Union*, 471 U.S. at 856 n.21 (internal quotation marks omitted). The same is true if the litigant can demon-

strate that the tribal court is unable to provide "an adequate opportunity to challenge" tribal jurisdiction, *id.*, in which case the defendant may challenge tribal court jurisdiction directly in the federal courts.

Second, statutory full faith and credit restrictions provide another layer of protection against judgments tainted by procedural unfairness. If a tribal court issues a decision that does not comport with due process or equal protection requirements, state or federal courts may decline to enforce it. *See, e.g.*, *Bird,* 255 F.3d at 1152 (declining to enforce multimillion dollar judgment against nonmember because trial was infected by racial prejudice); *MacArthur* v. *San Juan County,* 497 F.3d 1057, 1067 (10th Cir. 2007) ("[A] tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law."); *Starr* v. *George,* 175 P.3d 50, 55 (Alaska 2008) (similar); *Langdeau* v. *Langdeau,* 751 N.W.2d 722, 734 (S.D. 2008) (requiring proof that tribal court "order or judgment was obtained by a process that assures the requisites of an impartial administration of justice").

For example, under Michigan state law, tribal court judgments are "presumed to be valid," but that presumption may be overcome if the party resisting enforcement can show that the tribal judgment "(a) was obtained by fraud duress, or coercion, (b) was obtained without fair notice or a fair hearing, (c) is repugnant to the public policy of the State of Michigan, or (d) is not final under the laws and procedures of the tribal court." Mich. Ct. R. 2.615(C). Many other states have similar laws. *See, e.g.*, Ariz. Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rule 5(c) (applying presumption of valid-

ity, subject to review for procedural and substantive fairness); Mich. Ct. R. 2.615(C) (same); Wash. Sup. Ct. R. 82.5(c) (same, provided that tribe recognizes state court judgments); Wyo. Stat. Ann. § 5-1-111 (according full faith and credit, subject to review for compliance with ICRA)); Wis. Stat. Ann. 806.245.4(f) (same)).

Finally, nonmembers remain free to manage their exposure to liability by contract. Nothing prevents businesses like petitioners' from insisting on binding arbitration clauses or state forum-selection and choice-of-law clauses, along with waivers of tribal sovereign immunity, as a condition of doing business on tribal lands. *See, e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (arbitration clause with tribe constituted waiver of sovereign immunity); *Rush Creek Solutions, Inc.* v. *Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004) (enforcing contractual forum-selection clause against tribe); *Bradley* v. *Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2003) (same); *Warm Springs Forest Prods. Indus.* v. *Emp. Benefits Ins. Co.*, 716 P.2d 740, 742 (Or. 1986) (enforcing a choice-of-law provision against tribal plaintiff suing nonmember insurer).

What businesses may *not* do is enter tribal land, engage in extensive interactions with the tribe and its members, and then seek to avoid repercussions for the harm inflicted on one of the tribe's members based on spurious legal arguments and unfounded attacks on tribal justice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 2015

REPLY BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners are the non-Indian operators of a business on a tribal reservation. Respondent Doe is a member of the tribe. Doe seeks to hale petitioners into his tribal court, asking the tribe to award him millions of dollars in damages (including punitive damages) for an alleged violation of unwritten tribal tort law by one of petitioners' employees. Petitioners do not attempt to avoid their applicable duties in tort. Rather, because petitioners have not given actual consent to the tribal court's jurisdiction, the proper forum for a claim by Doe is a neutral state court.

The starting point for this case is the strong presumption against tribes exercising jurisdiction over nonmembers such as petitioners. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). Here, that presumption is not overcome. No statute or treaty grants the Tribe the power to finally decide Doe's private tort claim. Respondents instead assert that, when the tribes were incorporated into the United States in the 1800s, Congress accepted that every tribe retained the power to decide members' private civil claims against nonmembers. There is no evidence that the federal government of the time had that understanding and every reason to think it did not. The tribes were recently hostile. Even those tribes that did have judicial systems (and many did not) were not bound by basic constitutional protections, such as the Due Process Clause and the Seventh Amendment right to trial by jury.

By contrast, non-citizen litigants in state court were guaranteed the protections of the Constitution;

the right to avoid local bias by removing many cases to neutral federal court; and the right to seek this Court's review of rulings on questions of federal law. That prospect, in turn, encouraged the lower courts to adhere to the requirements of the Constitution. Respondents' remarkable theory is that Congress in the 1800s nonetheless intended to treat the widely varying (indeed, frequently non-existent) tribal judiciaries with greater respect and independence than it afforded the established judiciaries of the sovereign states. That claim answers itself.

Respondents ask this Court to engage in extra-record fact-finding to determine that this one tribe's courts regularly and fairly decide private tort suits by members against nonmembers. Br. 7. But their effort only proves the opposite. Respondents base their claim on the representation that they reviewed "almost 5,000 cases involving nonmembers," finding that eighty-five percent "resulted in a settlement or a win for the non-Indian party." *Id.* Notably, petitioners could test that claim – like any other inquiry about the doctrines and decisions of this tribal court – only by traveling personally to the Tribe's lone courthouse and studying individual case files, one by one. So petitioners did, reviewing a sample of 1223 cases involving nonmembers. It turns out that respondents' representation was very misleading.

In fact, only *thirteen* of the examined cases – roughly one percent – were private claims by members against nonmembers. In one, the nonmember defendant was dismissed; the other twelve are still pending. The remaining ninety-nine percent were *brought by a nonmember*, who by

definition actually consented to jurisdiction. The vast majority were breach of contract claims, most for nonpayment of a debt. More than one-third simply sought enforcement of a garnishment order of *a state court*.

These data do not support respondents' contention that tribal tort suits by members against nonmembers are commonplace and routinely resolved in the nonmembers' favor. It refutes it.

Respondents' statistics do serve to show that petitioners' position is no obstacle to the tribal courts enforcing tribal tort law in the overwhelming majority of cases – *i.e.*, those between citizens of the sovereign (the tribe's members) and whenever the nonmember actually consents to tribal court jurisdiction by filing suit in tribal court or agreeing to a forum-selection clause in a contract. To the extent respondents are correct that the experience of the Mississippi Choctaw is representative, the tribes would retain their jurisdiction in roughly ninety-nine percent of cases involving nonmembers. That is no major intrusion on tribal prerogatives.

At the very least, respondents' flawed argument highlights that while such empirical questions are *critically* important, Congress is the correct institution to gather the actual facts and adopt appropriate legal rules that account for the varying circumstances among tribal court systems. As it has in other contexts, Congress can adopt minimum standards for judicial competence and independence that ensure that claims – which raise the prospect of the tribe awarding crippling damages in favor of their members and against non-Indians – are fairly decided and that rulings on questions of federal law

are ultimately reviewable in this Court. *See* Pet. Br. 41.

For those reasons and those that follow, the judgment should be reversed.

I. Absent Actual Consent, Tribes Do Not Have The Inherent Power To Decide Tort Claims By Members Against Nonmembers.

Petitioners' first argument assumes for present purposes that tribes have the "legislative jurisdiction" to adopt tort law that governs the on-reservation conduct of nonmembers. But even on that assumption, the tribes' courts lack "adjudicative jurisdiction" to decide members' private civil claims against nonmembers under that law.

There is a well-settled presumption against tribes exercising jurisdiction over nonmembers. *See Montana v. United States*, 450 U.S. 544, 565 (1981). Everyone agrees that no legislation overcomes that presumption here, as no federal statute grants tribal courts the power to adjudicate civil claims against nonmembers.

Respondents' argument is that this Court should infer adjudicative jurisdiction from legislative silence, holding that the tribes possess it because they have not "been stripped of" it by any specific law or treaty. Br. 39. Their premise is that the tribes had this power as part of their inherent authority that pre-existed and survived incorporation into the United States.

Respondents do not attempt to show any of those things as a historical matter. Rather, they maintain that the actual history is irrelevant because prior cases supposedly state that tribes have civil

adjudicative jurisdiction as a "form of regulation." Br. 16. They insist that the burden therefore is on petitioners to overcome *stare decisis* effect of that prior precedent. *Id.* 38-39. Those arguments lack merit.

A. Upon Incorporation Into The United States Tribes Lost Any Power To Adjudicate Tort Claims By Members Against Nonmembers.

This Court has previously addressed similar questions about tribal jurisdiction under an established, commonsense framework. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (civil); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (criminal). That precedent directs courts to examine the shared understanding of the Executive, Congress, and courts at the time of incorporation, as well as the claimed power's compatibility with the United States' overriding sovereignty. Pet. Br. 23.

1. The Relevant Historical Materials Establish That Congress Did Not Understand That Tribes Would Adjudicate Tort Claims By Members Against Nonmembers.

Respondents do not seriously dispute that a historical inquiry is fatal to their position. *See* Pet. Br. 23-46; Resp. Br. 38-42. Rather, they attempt to deride petitioners' persuasive historical evidence as "amateur law-office history." Resp. Br. 39. That is true only if one calls a judicial chambers a "law office" and Chief Justice Rehnquist an "amateur"; respondents apparently fail to recognize that much of

this historical record is collected in the Chief Justice's opinion for the Court in *Oliphant*. *See* Pet. Br. 24-25, 30-31, 36. And the Court will not fail to notice the absence of any contrary historical evidence in respondents' brief.

As this Court observed proximately to the relevant period in our nation's history, upon incorporation of the tribes, it was the general policy of the United States to "vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians" and to "reserve to *the courts of the United States* jurisdiction of all actions to which its own citizens are parties on either side." *In re Mayfield*, 141 U.S. 107, 116 (1891) (emphasis added).

That is unsurprising. Respondents do not dispute that at the relevant time, few tribes had anything like a recognizable court system. Those that did overwhelmingly did not distinguish criminal and civil actions. Pet. Br. 24. Indeed, the tribal courts of the time generally do not appear to have *recognized* anything resembling the tort regime that respondents claim is subject to the tribe's *retained* adjudicative jurisdiction in this case.[1]

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[1] The fact that respondents' *amici* can identify only three tribes that distinguished between civil and criminal jurisdiction, each of which had unusually developed and westernized legal systems, shows only that most tribes recognized no such distinction. Historians Br. 13. The same conclusion follows from the fact that the *amici* ground their claim that tribes retained civil jurisdiction on materials overwhelmingly referring to criminal matters.

Those *amici* point to a smattering of examples in an effort to prove up claims that either: (i) are not disputed (that upon

This state of affairs answers the United States' point that many treaties of the period did not by their terms expressly withdraw tribes' "civil" jurisdiction over nonmembers. Br. 26-27. The relevant treaty language captured all tribal jurisdiction, which drew no distinction between criminal and civil cases. Pet. Br. 25-30. The treatise on which the United States relies explains that even as late as the 1940s, by which point tribal courts *had* distinguished civil and criminal cases, the tribes' codes typically granted their courts jurisdiction over matters in which members were defendants, but only such "other suits between members and nonmembers which are brought before the Courts *by stipulation of both parties*." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 382 (1942) (emphasis added). The Courts of Indian Offenses, which operated on reservations lacking a tribal court system, applied the same principles. *Id.*

The United States also omits that the Attorney General in 1834 concluded that it was "very certain" that absent intermarriage or adoption into a tribe, Americans were "not amenable to the laws or courts of the Choctaw nation." 2 Op. Att'y Gen. 693, 695 (1834). That conclusion is not contradicted by a later statement that, with respect to Indian Territory

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incorporation, tribes retained some regulatory jurisdiction over nonmembers); or (ii) that this Court rejected as a historical matter in *Oliphant* (that tribes retained comprehensive jurisdiction – including in *criminal* cases, Br. 14, 18 – "over non-Indians on tribal land," *id.* 8). They notably identify zero examples of tribes exercising anything resembling inherent adjudicative jurisdiction over nonmembers in tort.

where no state or territorial courts existed, tribal courts had jurisdiction over "such white men as of their own free will and accord choose to *become members* of the [Choctaw] nation." 7 Op. Att'y Gen. 180, 185 (1855) (emphasis added). That Opinion is consistent with the understanding that, particularly where state and federal courts *were* available (as they obviously are now), tribes would not have jurisdiction over members' private civil suits against Americans who had *not* joined the tribe

If the historical understanding had been to the contrary, it should have been easy for respondents to demonstrate a pattern of tribal courts asserting civil jurisdiction over nonmembers from the time of incorporation until now. But the opposite is true: they are unable to dispute that tribes began asserting this form of jurisdiction with any regularity only in the mid-1900s, roughly one *century* after incorporation. Pet. Br. 29.

Moreover, if respondents were right that the United States had always intended that tribal courts would exercise that jurisdiction, Congress surely would have done things differently. It would have articulated minimum competence and due process standards, as it did much later with respect to criminal jurisdiction over nonmember Indians and nonmember domestic violence defendants. *See* 25 U.S.C. §§ 1302, 1304. As with the courts of sovereign states, Congress would have provided a right of removal to federal court and a right to seek review in this Court of rulings on questions of federal law. At the least, it would have made this Court's interpretations of federal constitutional law binding

on tribal courts and recognized a right to a jury trial. *See* Pet. Br. 33.

Put otherwise, respondents' argument requires this Court to conclude not just that Congress was solicitous of the power of every single tribal court, but that it was substantially more so than with respect to the courts of sovereign states. At the very least, that claim is sufficiently tenuous that in the face of the existing legislative silence it cannot overcome the strong presumption against tribes exercising jurisdiction over nonmembers.

2. *Tribal Court Jurisdiction Over Nonmembers Is Incompatible With The Overriding Sovereignty of The United States.*

Even setting the historical record aside, it is fundamentally incompatible with the overriding territorial sovereignty of the United States for an American citizen to be deprived of liberty or property by a court system operating within the United States, but not governed by our Constitution, absent his actual consent. *See* Pet. Br. 37-40. This Court reached precisely that conclusion with respect to criminal matters in *Oliphant*. The fact that this is a civil matter so no one can go to jail, Resp. Br. 33-34, is not responsive to the problem. The affront to national sovereignty, which exists equally in the civil context, is subjecting an American citizen to the coercive power of a foreign sovereign operating within our borders unconstrained by our Constitution.

B. There Is No Merit To Respondents' Argument That This Court Already Granted Tribes Adjudicative Jurisdiction Over Nonmembers Under The First *Montana* Exception.

Because respondents cannot contest the foregoing, their only hope is to persuade this Court that it has already held that the first *Montana* exception grants tribes adjudicative authority whenever they have regulatory authority. Resp. Br. 22, 25. That argument cannot be squared with the fact that this Court took great care to specify – after *Montana* and all the other cases respondents cite – that "whether a tribe's adjudicative jurisdiction over nonmembers defendants *equals* its legislative jurisdiction" is an "open . . . question," one that "deserves more considered analysis" than it has yet received. *Nevada v. Hicks*, 533 U.S. 353, 358, 374 (2001). That is correct, as respondents misread this Court's cases.

1. Respondents argue that *Montana* authorized tribal court adjudication of private tort claims against nonmembers, implying that such suits are among the retained "other means" of "regulating" nonmembers' consensual relationships with tribes and their members. *See* Resp. Br. 22-25. In fact, the forms of "regulation" recognized and cited in *Montana* are distinguishable for two important reasons.

First, they are bodies of positive law, such as taxation and licensing. By contrast, the tribe's authority to permit private parties to *enforce* those bodies of law by judicial decree is a separate matter.

Oliphant is a perfect example: this Court did not doubt the tribe's authority to enact laws prohibiting an assault on tribal officers (legislative jurisdiction), but it held that tribes do *not* have the authority to enforce those laws against nonmembers through a criminal trial in tribal court (adjudicative jurisdiction).

Also, the first *Montana* exception involves regulations that the tribe as sovereign itself applies directly to the nonmember – for example, taxes and licensing regulations. Those measures are therefore much more easily understood as forms of tribal self-governance. In turn, a suit by the tribe itself to enforce its regulation may be "regulatory" too. This case, by contrast, is a private civil claim regarding alleged harm to an individual tribal member in his individual capacity. By definition, it is at least one material step removed from self-governance.

Any doubt is resolved by the fact that the *Montana* exceptions are a reflection of what Congress, the Executive, and the courts would have understood at the time of incorporation. They are not a discretionary grant of tribal jurisdiction by this Court. And for the reasons given in the previous section *that respondents do not seriously dispute*, there is every reason to believe that Congress did *not* anticipate that tribes would exercise civil tort jurisdiction against nonmembers. That result does not change simply by slapping the label "regulation" on that significant area of tribal authority.

3. Respondents' reliance on cases post-dating *Montana* fares no better. They invoke this Court's assumption that substantive "tribal tort *law*" is "a form of regulation." *Plains Commerce Bank*, 554 U.S.

at 332 (emphasis added); *see* Resp. Br. 16, 24. But this Court has never suggested that private tort *litigation* is a form of regulation contemplated by the first *Montana* exception.

Respondents say that *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), establishes that the *Montana* framework resolves the scope of tribes' adjudicative authority. Resp. Br. 22-23. *Hicks*, however, explained that *Strate*'s actual "holding" is merely that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 533 U.S. at 357-58; *see Strate*, 520 U.S. at 453. Having found that the tribe lacked legislative power over the conduct at issue, *id.* at 456-59, the Court had no need to consider whether it would otherwise have had adjudicative jurisdiction. *See also* Resp. Br. 22-23 (similarly erring in relying on *Atkinson Trading Co. v. Shirley*'s characterization of *Strate* as holding that the *Montana* exceptions apply to "tribal assertions of [civil] adjudicative authority") (citing 532 U.S. 645, 652 (2001)).

Respondents say that *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), rejected the idea that tribal courts *never* have civil adjudicative jurisdiction over nonconsenting nonmembers. Br. 34. Again, *Hicks* makes clear that this issue remains open. 533 U.S. at 358 n.2 (explaining that *National Farmers* "*avoided* the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions" (emphasis added)).

National Farmers did state that *Oliphant*'s categorical rule that tribes never have criminal jurisdiction over nonmembers does not necessarily

apply to every civil case in every context, noting that *Oliphant* relied on some factors that were criminal-specific. *See* 471 U.S. at 854-55. But petitioners do not contend that *Oliphant* decides this case as a matter of *stare decisis*. Instead, it establishes the governing legal framework. Petitioners undertake – and respondents reject – exactly the inquiry that *National Farmers* calls for: a "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," taking into account the differences between criminal and civil jurisdiction. 471 U.S. at 855-56 (footnote omitted); *see* Pet. Br. 20-40.

4. With no sound *stare decisis* argument, respondents are left to claim that it simply "makes good sense" that tribes' adjudicative jurisdiction would follow *ipso facto* from their legislative jurisdiction. Br. 21; *see also id.* 24. That is not persuasive.

Congress would have recognized the obvious point that liberty and property are separately put at risk both by initial arbitrary lawmaking and by subsequent unfair adjudication of facts and biased application of law to facts in particular cases, including cases like this one that present the prospect of a tribe awarding one of its members a multi-million dollar punitive damage award. Our legal system includes not just the U.S. Code but the extensive Rules of Civil and Criminal Procedure designed to ensure that the law is fairly enforced in court. Similarly, American courts may refuse to

enforce a foreign judgment because of structural concerns about the adequacy of the foreign courts, even when there is no question about the foreign government's underlying authority to regulate the defendant's conduct. *See, e.g.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239-40 (2d Cir. 2012).

Respondents counter that an essential element of sovereignty is the power to always enforce the sovereign's laws in its own courts. That is simply wrong: even sovereign *states'* laws are commonly applied in other state and federal courts under choice of law principles, including after removal to federal court. Also, as discussed, respondents' data shows that tribes do not require this form of jurisdiction to adjudicate ninety-nine percent of cases involving nonmembers.

C. Tribal Courts May Exercise Jurisdiction Over Nonmembers Only If The Nonmember Actually Consents.

Respondents' argument fails even if the *Montana* framework governs the scope of adjudicative jurisdiction, because petitioners did not actually consent to the tribal court's jurisdiction. The Court will avoid construing the first *Montana* exception in a way that "risk[s] . . . subjecting nonmembers to tribal [adjudicative] authority without *commensurate* consent." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). While forms of constructive consent may suffice for imposition of taxes and licensing requirements, only actual consent is commensurate to the exercise of tribal adjudicative over tort claims against nonmembers.

There is a ready analogy to a party's consent to the resolution of a dispute outside the ordinary civil court system through binding arbitration. That decision requires actual, not constructive, consent. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998). That makes perfect sense: the party is giving up substantial constitutional protections, and "[c]ourts do not presume acquiescence in the loss of fundamental rights." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012) (citation omitted).

Respondents nonetheless maintain that a nonmember *constructively* consents to tribal court jurisdiction by engaging in a consensual relationship with a tribe or its members. Resp. Br. 29. They embrace the startling breadth of that rule: the tribe would have adjudicative jurisdiction over every claim against any nonmember having some nexus with a consensual relationship with a tribe member or a tribe. *Id.*

In this particular case, respondents claim that a party operating a business on tribal land will intuitively know that it is subject to tribal court jurisdiction, including for tort claims. Like all of respondents' arguments regarding consent, this one is simply question begging: what the nonmember would expect turns on how this Court resolves the Question Presented in this case.

It just as easily could have been said that the defendant in *Oliphant* necessarily understood that he would be subject to the tribe's criminal jurisdiction. In fact, the tribe in *Oliphant* posted notices at the entrances to the reservation "informing the public that entry onto the Reservation would be deemed

implied consent to the criminal jurisdiction of the Suquamish tribal court." 435 U.S. at 193 n.2. The tribe still lost.

Respondents themselves have expressed doubts about their own rule. For example, the Tribe apparently did not believe that petitioners constructively consented to tribal court jurisdiction over claims relating to their lease simply by engaging in a consensual relationship with a tribal landlord; it required petitioners to agree in writing that those disputes would be heard in tribal court. J.A. 47-48.[2]

Respondents' argument also creates substantial problems of administration. Jurisdictional rules must be clear in advance. *See, e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). But if respondents prevail, it will often be impossible to know *ex ante* whether adjudicative authority lies in tribal, or instead state or federal, court. What kinds of on-reservation conduct are sufficient? What if the nonmember is a business delivering goods ordered by a member? What if the nonmember knowingly

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[2] Respondents do not seriously claim that petitioners *actually* consented through the lease (which conspicuously omits any mention of tort suits or liability to third parties) or otherwise. The fact that neither the tribal court nor respondents assert that the tribal court had jurisdiction under the lease's limited choice-of-forum provision resolves that issue. *See* Pet. App. 85-86; Resp. Br. 31; *contra* U.S. Br. 13. The provision of the lease the Government cites does not constitute consent to tribal court jurisdiction because the Tribe's long-arm statute is neither a law that petitioners can "comply with" nor a law that "pertain[s] to [a] specific use of the demised premises." J.A. 45.

travels onto the reservation to purchase goods from an Indian business? What is the rule for employees of a business that does operate on a reservation? And so on. All of those are commercial activities on the reservation, but respondents and their *amici* have no administrable rule for determining when a private civil claim should be brought in tribal court.

Layer on top of that the significant uncertainty, acknowledged by respondents' *amici*, whether the activity in question is occurring on tribal land and whether the other party is a member of the tribe. *See* Petr. Br. 53-54; Miss. Br. 16-17. The inevitable uncertainty will result in wasteful collateral attacks in federal court over the tribes' power.

2. There is no merit to respondents' claim that a ruling in petitioners' favor would have sweeping implications for tribes' ability to hold nonmembers accountable for violations of tribal law.

Respondents' arguments have their greatest force with respect to the on-reservation conduct of nonmember businesses. But that is easily addressed by conditioning operation of the business on express assent to the tribal court's jurisdiction—just as the tribe did with respect to the narrow subcategory of disputes involving petitioners' lease. *See supra* at 16 n.2. The nonmember will then unmistakably know the risks it is taking and can chose whether to invest in conducting business on the reservation. In addition, even without civil adjudicative jurisdiction, tribes and their members retain the power to enforce tribal law through exclusion from the reservation and filing private actions in state court, which are ready and able to issue injunctions and grant damages against non-Indians when appropriate.

Moreover, this case does not present the question whether tribes *themselves* may sue nonmembers in tribal court for violation of rules that legitimately apply to nonmembers. Accordingly, a decision here need not force "*tribes* . . . to resort to the courts of another sovereign." Resp. Br. 24 (emphasis added). Nor does the case present the opportunity to decide whether tribes may assert adjudicative jurisdiction over nonconsenting nonmembers under the distinct, *second Montana* exception, when the defendant's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

Respondents would turn the tables by requiring the nonmember to "insist[] on binding arbitration clauses or state forum-selection and choice-of-law clauses, along with waivers of tribal sovereign immunity, as a condition of doing business on tribal lands." Br. 54. But they cannot bring themselves to say that the business could *successfully* insist on those terms. Nor do they suggest how such an agreement would be binding as against private plaintiffs like Doe. If Dollar General opens a store in Mississippi, it cannot secure a contractual agreement from that state's government that Mississippi citizens will only file suit in Georgia. In any event, that is not how it works: tribes presumptively lack jurisdiction over nonmembers; they do not gain that jurisdiction by insisting that nonmembers secure a negotiated disclaimer of it.[3]

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[3] There is no merit to respondents' claim that this Court cannot reach the broad question whether tribes ever possess

II. Because Tribes Lack Legislative Jurisdiction To Apply Unwritten Tort Law To Nonmembers, They Necessarily Lack Adjudicative Jurisdiction Over Such Claims.

Another route leads to the same conclusion that Doe's tribe lacks adjudicative authority over his suit: the tribes do not have the inherent authority to apply unwritten tort law to nonmembers, because tort law is not an "other means" for regulating consensual

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inherent adjudicative jurisdiction over nonmember defendants. They ask this Court rule for them in this case, but hold open that it may later render that ruling a complete nullity by holding that tribes lack actually any civil adjudicative jurisdiction over nonmembers whatsoever. That makes no sense. Whether tribal courts ever have adjudicative jurisdiction over nonmembers is thus properly before the Court because it is a logically antecedent question.

Although respondents say now that petitioners did not exhaust this precise argument before the tribal courts, they omitted any exhaustion objection in opposing certiorari, BIO 19-20, thereby waving it. In any event, petitioners did exhaust their claim that the tribal court lacked jurisdiction. *See* Pet. App. 78. They were not required to make the precise argument – futile under that court's jurisdictional rules – that it lacked any civil adjudicative jurisdiction against nonmembers in any case.

The argument also addresses the Question Presented, explaining why tribes lack adjudicative jurisdiction over tort claims against nonmembers. Both the tribal court and the Fifth Circuit also passed on the issue, assuming that the Tribe's adjudicative and regulatory jurisdiction were co-extensive. *See* Pet. App. 10, 82-84; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995). *Contra* U.S. Br. 25.

relationships under the first *Montana* exception. Pet. Br. 47-54.

Respondents do not seriously dispute that extending the first *Montana* exception to include tort law would dramatically expand tribes' authority over nonmembers. Indeed, it would "swallow the rule" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citations and internal quotation marks omitted). Through its list of examples, the Court illustrated the kind of regulation the first *Montana* exception encompasses: tax provisions, licensing requirements, contract law, and the like.

Tort law is much broader. It governs essentially every interaction between people or businesses – here, every tribal member's interactions on the reservation with any nonmember. Respondents' *amici* take pains to catalogue the wide range of nonmember conduct they intend to subject to civil claims in tribal court for damages, civil penalties, civil forfeiture, and punitive damages. *See, e.g.*, NCAI Br. 4-23.

A ruling in respondents' favor will open nonmembers, and nonmember businesses in particular, to the pervasive prospect of civil suits regarding the vast majority of their activities on tribal land. For example, tribal courts recently have asserted the power to adjudicate an array of claims against nonmember businesses, ranging from personal injury claims against drug manufacturers to suits against interstate telecommunications companies. *See, e.g.*, Pet. App. 89; *Sprint Commc'ns*

Co., L.P. v. Wynne, No. 4:15-CV-04051-KES, 2015 WL 4644983 (D.S.D. Aug. 4, 2015).

Respondents' suggestion that some limitation is provided by the fact that tort must bear a "nexus" to a "consensual relationship" evaporates immediately, as they suggest that the on-reservation conduct that constitutes the tort *is* the required "consent." Br. 49. Perhaps an ordinary car accident would be too ephemeral a contact with the tribe. But respondents conspicuously omit any suggestion of where the line is drawn, again raising serious questions of administrability.

The substantive requirements of tort law are also uniquely difficult for nonmembers to discern. For example, the Tribe acknowledges that its tort law is unwritten and publicly available (if at all) only by personally appearing at the tribal court to review individual case files. Resp. Br. 7. In fact, the relevant law may be determinable only by a few tribal elders who are called upon to declare its application in individual cases. Choctaw Tribal Code § 1-1-4.

Seeking to reassure the Court, the Tribe says that it looks to Mississippi law "in the absence of on point tribal law," *id.* 49, but never describes where those gaps exist. Petitioners' review of the tribal court files, *supra* at 2-3, suggest that in fact, it is impossible to know.

Moreover, even if a particular tribe chooses to incorporate some strand of Anglo-American tort law, others need not. And for those that do, nonmember defendants frequently will have no mechanism to know *ex ante* what that strand will be. For example,

in a case like this one, a business may have no idea which of the substantially different state law rules addressing vicarious liability for punitive damages a tribe would apply. *See* Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 513-14 (2010).

In truth, respondents admit the inscrutability of tribal tort law when they complain that state courts will apply it differently than tribal courts. Br. 45-46. The possibility of some minor variation is an accepted cost of the long-settled practice of state courts applying foreign law. But respondents' suggestion that the substance of tribal tort law is so unknowable *ex ante* that a state court cannot correctly apply it even after full briefing and argument by the parties creates serious doubt that a nonmember defendant can know the rules of the game before it is played. That is a reason to be concerned with respondents' position, not persuaded by it.

III. Congress Is The Only Body That Can Evaluate Respondents' Claims About Recent Advancements In Tribal Justice.

Respondents and the United States maintain that in the modern era some tribes – including the Mississippi Choctaw – have well-developed and reliable judiciaries. To the extent that is so, it is to be celebrated and genuinely respected. It is not, however, directly relevant to the question presented by this case, for two reasons.

First, respondents have only the inherent adjudicative jurisdiction that Congress understood they would retain when the tribes were incorporated into the United States in the 1800s. Modern

experience is evidence that can now be presented to the legislature in support of expanding that jurisdiction; it is not evidence that can change retroactively the scope of the tribes' retained inherent authority. Put another way, respondents almost seem to concede that they would have lost this case if it had been decided by this Court in 1915 rather than 2015. But in fact, nothing expanded the tribes' inherent jurisdiction in the intervening century.

Second, the experience of this tribe obviously means very little when the holding that respondents seek would recognize jurisdiction in *every* tribal court in *every* tort case. Respondents assert that "[t]he Choctaw Courts are representative." Br. 18. But in support they cite *nothing at all*. The most the United States is willing to say is that "*many* tribal courts, including [this Tribes'] have developed" effective and respectable courts. U.S. Br. 31 (emphasis added). That is hardly a ringing endorsement of tribal courts generally. The other side's inability to establish the adequacy of tribal judicial systems more broadly is not for a lack of resources or trying, as the Bureau of Indian Affairs and the combined experience of all of respondents' tribal *amici* surely have put before this Court all the favorable evidence that exists.

Respondents attempt to assure the Court that nonmembers have *some* protection from mistreatment in the worst tribal court systems. But their reliance on the fact that a federal statute (the ICRA) requires tribes to provide some form of "due process," Br. 52, is not comforting. Many tribal courts "*routinely* have ruled that the meaning and application of the ICRA is *not* determined by Anglo-American constitutional interpretations." Robert J.

McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998) (emphasis added).

Take a case like this one. Doe asks his own tribe to award him millions of dollars in punitive damages against a foreign business. If respondents prevail, the Court can expect such claims to be commonplace. And on respondents' view, those claims can be adjudicated without a jury (or with a jury from which nonmembers are excluded), or even by an elected tribal council, all of whom know the plaintiff, with no possibility of a change in venue, and no appellate review. *See* Pet. Br. 3-9. The tribe would nominally have to provide "due process" under ICRA, but there is no guarantee it would follow this Court's interpretation of due process as prohibiting excessive punitive damages awards. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996). And even if erroneous, the tribal court's ruling on that question would be immune from direct review in this Court.

Respondents say that in some circumstances a state or federal court might refuse to enforce a tribal tort judgment. Br. 53. But on their view, such a ruling is reserved for the most extreme cases. It is in any event cold comfort to the nonmember who must litigate the collateral attack and whose on-reservation property may be seized in any event by the tribe itself in executing the tribal court's judgment in favor of its member.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, *ET AL.*,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RULE

Sup. Ct. R. 15.8 1

INTRODUCTION

Pursuant to Sup. Ct. Rule 15.8, Respondents submit this supplemental brief to address new authority which did not exist at the time Respondents' Brief in Opposition was filed. The new authority is *Jackson v. Payday Financial, LLC,* ___ F.3d ___, 2014 WL 4116804 (7th Cir. 2014). The ruling of that case further documents the absence of any split in the Circuits on the question whether *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* 554 U.S. 316 (2008) adopted a narrower, more stringent version of the "consensual relationship" exception respecting tribal jurisdiction established in *Montana v. United States,* 450 U.S. 544 (1981). This additional case law confirms there is no split in the Circuits regarding the core issue on which *certiorari* has been requested.

THERE IS NO SPLIT IN THE CIRCUITS ON THE CORE ISSUE ON WHICH *CERTIORARI* HAS BEEN REQUESTED.

Respondents' Brief in Opposition was filed on August 21, 2014. Respondents argued *inter alia* (Br.in Opp., pp.11-12, 17), that all of the Circuits which had addressed the issue had ruled that "*Plains Commerce* did not change anything about the consensual relationship exception or the nexus text." *Id.* at 11. Respondents cited cases from the Eighth, Ninth and Tenth Circuits, together with the Fifth Circuit's ruling in the instant case to support that point. *Id.* at 11-12.

On August 22, 2014, the Seventh Circuit issued its ruling in *Jackson v. Payday Financial, LLC,* ___ F.3d ___, 2014, WL 4116804 (C.A.7 (Ill.)). There the Court applied the same consensual relationship test as had

been established before *Plains Commerce*. *Id.* at 14. The Court held that the Cheyenne River Sioux Tribal Court did not have jurisdiction to adjudicate various non-Indian loan customer claims against a tribally-affiliated lender arising from payday loan transactions because the non-Indian parties had never engaged in any activity on the Tribe's reservation lands, and all their loan transactions with the tribally-affiliated lender had occurred off-reservation in Illinois, another state:

> Here, the Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims.
>
> * * * *
>
> The [tribal lender], however, made no showing that present dispute implicates *any* aspect of "the tribe's inherent sovereign authority.[43]" *Id.* at 14-15.

In footnote 43, the Court discussed *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014), observing that the case "is not to the contrary" respecting the Seventh Circuit's conclusion in text that the events in *Jackson* did not implicate "*any* aspect of 'the tribe's inherent sovereignty.'" *Id.* at 22.

The Court in *Jackson* in footnote 43 distinguished *Dolgencorp* on its facts, noting *inter alia* that the "Dolgencorp case arose from claims that a tribal member had been 'sexually molested by the store manager'" at "a Dollar General Store located on reservation lands," concluding that "[i]n the present situation, there is no equivalent tribal concern that satisfies the requirements of *Plains Commerce.*" *Id.* at 23. (Emphasis added).

The Seventh Circuit then quoted without disapproval the very portions of the *Dolgencorp* opinion in which the Fifth Circuit rejected petitioner's argument that *Plains Commerce* had altered the consensual relationship test:

> ... the Fifth Circuit rejected Dolgencorp's argument "that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the *specific* relationships "implicate tribal governance and internal relations.'" *Id.* at 174 (emphasis added) (quoting *Plains Commerce Bank,* 554 U.S. at 334-35). It stated:
>
> > It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the

> tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general. *Id.* at 23.

The *Jackson* case further documents the absence of any split in the Circuits on the proposition that *Plains Commerce* did not make any change to the consensual relationship test, adding the Seventh Circuit to the Fifth, Eighth, Ninth and Tenth Circuits which have so ruled as shown in Respondents' Brief in Opposition.

The *Jackson* case further supports Respondents' request that Petitioners' request for a *writ of certiorari* be denied.

CONCLUSION

Petitioners' request for a *writ of certiorari* be denied.

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SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
MAY 19 2021
OFFICE OF THE CLERK

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

When, if ever, a tribe may subject a nonmember to suit in tribal court is an open question in this Court, with profound and recurring significance. *See Nevada v. Hicks*, 533 U.S. 353 (2001); Pet. 17-18. This Court granted certiorari to decide an important part of that question in *Plains Commerce Bank v. Long Family & Land Cattle Co.*, 554 U.S. 316 (2008). Like respondents, the Government does not dispute that this petition raises the same question upon which the Court granted certiorari, but did not reach, in that case. *See* U.S. Br. 18-19. The stark disagreement within the Fifth Circuit over the meaning of this Court's tribal jurisdiction precedents only reaffirms the continuing need for the Court's intervention. So the question for the Government, as it was for respondents, is why the Court should pass up this square opportunity to resolve the festering question in this case. Like respondents, the Government has no good answer.

I. The Petition Presents An Important And Recurring Question That Warrants Review.

1. The United States does not dispute that if the Court remains interested in deciding the question upon which it granted certiorari in *Plains Commerce Bank*, this case presents an appropriate vehicle to do so.

That is, the Government does not deny that the Fifth Circuit here decided the same fundamental questions resolved by the Eighth Circuit in *Plains*

Commerce Bank.[1] And it does not dispute that the question presented by this petition encompasses the same question the Court granted certiorari to decide in the prior case. *See* Pet. App. i, 13-15.

Nor has the Solicitor General identified any vehicle problems. Although the Government says that petitioners pressed a variety of other arguments below, it does not dispute that the question presented was at least passed upon by the court of appeals and, therefore, is preserved for this Court's review. *See* U.S. Br. 8; *Citizens United v. FEC*, 558 U.S. 310, 330 (2010). And the Government does not contest that the answer to the question is outcome determinative of the litigation in federal court.[2]

2. Instead, like respondent, the Government contends that the question the Court granted certiorari to decide in *Plains Commerce Bank* was not

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[1] Like the court of appeals in this case, the Eighth Circuit held that a business forms the consensual relationship required by the first exception under *Montana v. United States*, 450 U.S. 544 (1981), when it engages in a commercial relationship with tribe members. *Plains Commerce Bank v. Long Family & Land Cattle Co.*, 491 F.3d 878, 886 (8th Cir. 2007). Both courts then held that tribal courts have jurisdiction under the first *Montana* exception over tort claims having "some nexus to th[at] consensual relationship." *Id.* at 886; *see also* Pet. App. 13-14, 17. And both courts expressly held that tort litigation "is an appropriate 'other means' by which a tribe may regulate nonmember conduct." *Plains Commerce Bank*, 491 F.3d at 885; *see also id.* at 887; Pet. App. 13,

[2] The Government does not repeat respondents' meritless objection that the case is interlocutory. *See* BIO § II; Cert. Reply 2.

certworthy then and remains uncerworthy now. *See* U.S. Br. 16-22.

The Government thus repeats respondents' argument that there is no circuit conflict, U.S. Br. 16-19, ignoring that the Court did not grant certiorari in *Plains Commerce Bank* to resolve any circuit split. *See* Cert. Reply 1-2. The Government then suggests that the Court did not really want to address the question upon which it actually granted certiorari, intending all along to decide the narrower issue actually resolved in the Court's eventual decision. U.S. Br. 18. But if the Court had granted review believing that the question the petitioner presented was not certworthy, it presumably would have rewritten the question presented, knowing that if it did not, the briefing and the oral argument would focus unhelpfully on the question actually posed by the petition (which is what happened[3]).

The Government ends by claiming that "the paucity of cases that have needed to get even close to considering such a question in the intervening years strongly suggests that, in the absence of any conflict, the Court's intervention is unnecessary." U.S. Br. 19. But it is a rare case in which a defendant has the resources to challenge tribal jurisdiction by filing a separate federal action that could result in a published opinion. And the Government points to

---

[3] *See generally Plains Commerce Bank v. Long Family Land & Cattle*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/plains-commerce-bank-v-long-family-land-cattle (last visited May 16, 2015) (collecting briefs and argument transcript).

nothing to suggest that reported cases were more frequent when the Court granted certiorari in *Plains Commerce Bank*.

More importantly, the Government's argument overlooks the consequences of a federal court of appeals declaring for the first time that tribal courts have jurisdiction over every tort claim with some "logical nexus to some consensual relationship between a business and the tribe or its members." Pet. App. 17. The Government does not deny that this decision "open[s] the door to 'pervasive tort liability against countless business[es] and individuals.'" U.S. Br. 13 (second alteration in original) (quoting Pet. 20). To the contrary, the Government *embraces* that prediction, stating only that "petitioners give no reason to think that the tribal courthouse doors have heretofore been closed to" such claims. U.S. Br. 13-14 & n.6.

Permitting tribal court jurisdiction over tort claims against nonmembers constitutes "a serious step," given the Constitution's premise of "original, and continuing, consent of the governed." *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment). Even though they may be on reservation land, "nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337. When, if ever, a citizen of a state and the United States may be subject to the jurisdiction "of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States," *Lara*, 541 U.S. at 212 (Kennedy, J., concurring in the judgment), is a question that should be resolved by

this Court, not left to the lower federal and tribal courts.

3. Certiorari is further warranted because both the decision below and the Government's defense of it illustrate a continuing, profound confusion and disagreement over the scope of tribal court jurisdiction over nonmembers.

While five judges dissented from the denial of rehearing en banc on the ground that the panel decision went "well beyond anything supported by applicable precedent," Pet. App. 93, the Government argues that the panel did not go *far enough*. It insists that "to the extent that the tortious conduct at issue here occurred at petitioners' store on tribal trust land, the Tribe had jurisdiction to regulate that conduct without regard to *Montana*'s general rule or its exceptions." U.S. Br. 9-10 (footnote omitted). The Government suggests that tribes' right to exclude nonmembers from the reservation provides an independent source of authority to regulate nonmember conduct on tribal lands, including the right to subject them to tort claims in tribal courts for millions of dollars in punitive damages for any incident "aris[ing] out of an ongoing business on tribal trust land." *Id.* 11. While the Fifth Circuit did not embrace that extreme view in this case, the Government points out that the Ninth Circuit has. *See id.* 11 n.4 (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011)).

That the Government, different courts, and individual judges can reach such radically different readings of this Court's tribal jurisdiction precedents shows just how uncertain this area of the law has

become. *See also, e.g.*, *Lara*, 541 U.S. at 214-15 (Thomas, J., concurring in the judgment) (noting the "confusion reflected in our precedent" and calling on the Court "to reexamine the premises and logic of our tribal sovereignty cases"); *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring) ("Petitioners are certainly correct that 'tribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,' since this Court's own pronouncements on the issue have pointed in seemingly opposite directions." (alteration in original) (citation omitted)); *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9, 18 (N.D. 2004) (Vande Walle, C.J., specially concurring) ("[I]n matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is."); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1720 (2012) (noting that Court's *Montana* exception decisions have left "tribes to wonder as to the scope of tribal civil jurisdiction over nonmembers operating on non-Indian lands within Indian country").

That uncertainty is, in itself, harmful. As petitioners' *amici* have explained, those contemplating doing business on a reservation need to know whose laws will govern their conduct and whose courts will judge their alleged liability in the legal disputes that arise in the operation of any business. *See* Br. for *Amicus Curiae* South Dakota Bankers Ass'n. The United States suggests that tribes can resolve this problem by negotiating "appropriate choice-of-law or forum-selection clauses" in their contracts. U.S. Br. 21. However, it points to no evidence that this is a practical suggestion, much

less one that is employed in the real world. Tort claims frequently arise in the absence of any contractual relationship between the defendant and plaintiff. And while in this particular case the alleged tort occurred on property leased from the Tribe, not every company doing business on a reservation has such a lease (take, for example, the bank in *Plains Commerce Bank*, *see* 554 U.S. at 321). Moreover, this Court has never decided whether, or to what extent, such forum-selection clauses would be enforceable. Allowing tribes to condition entry onto the reservation, or doing business there, on consent to pervasive tribal jurisdiction would substantially erode the established rule that although tribes retain the right to "exclude outsiders from entering tribal land," they do not thereby obtain general "authority over non-Indians who come within their borders." *Id.* at 328. In any event, companies and tribes should not be forced to contract around the courts' failure to establish clear jurisdictional rules.

II. The United States' Defense Of The Fifth Circuit's Decision On The Merits Provides No Basis To Deny Certiorari.

Given the harmful uncertainty in the law, the Government's claim that the Fifth Circuit correctly decided this case is no reason to deny review. But the argument is meritless in any event.

1. Any analysis of tribal court jurisdiction must start from the premise that "the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits except themselves.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*,

554 U.S. 316, 328 (2008) (alterations in original) (citation omitted). Accordingly, "efforts by a tribe to regulate nonmembers" are "presumptively invalid." *Id.* at 330 (internal quotation marks and citation omitted). The *Montana* exceptions to this general rule "are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Id.* (internal quotation marks and citations omitted). Particularly when construing the scope of the first, consent-based exception, courts must avoid the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Id.* at 337. "Consequently, [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Id.*

The Government's position cannot be reconciled with these principles. The Government insinuates that petitioners consented to tribal tort jurisdiction *expressly* by signing a lease (or perhaps obtaining a business license) that required consent to application of tribal tort law to petitioners' business. *See* U.S. Br. 2-3, 12. Respondents do not make this argument, the district court rejected it, Pet. App. 62-62, and the Fifth Circuit declined to rely on it, *id.* 13-15, for obvious reasons. The lease contains standard terms prohibiting petitioners from using the premises "for any unlawful conduct or purpose," without identifying what law applies. Lease § XXIX (reproduced in App. A). Another provision does mention tribal laws, but only to require that compliance with such regulations as "are applicable and pertain to [petitioners'] *specific use of the demised premises*," *id.* § XXVIII, an obvious reference

to zoning-type regulations, not general tort law obligations to employees and customers. And although the lease *does* have a choice-of-law and venue provision, it is expressly limited to disputes between petitioners and their landlord regarding *the contract itself*, not tort claims between petitioners and their workers. *See id.* § XXVII (establishing law and venue for "[t]his agreement and any related documents").[4]

So the Government is forced to argue as well that tribal jurisdiction "may be fairly imposed on" petitioners because they "consented [to it] by [their] *actions*." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added). Specifically, the Government finds consent to tribal court tort jurisdiction in petitioners' decision to do business on a reservation and by their employee's agreement to accept plaintiff Doe as an unpaid intern. U.S. Br. 12-14. But if that argument were accepted, the first *Montana* exception would "swallow the rule" that "the tribes have, by virtue of their incorporation into the American republic, lost the right of governing . . . person[s] within their limits except themselves.'" *Plains Commerce Bank*, 554 U.S. at 328, 330 (alterations in original) (internal quotation marks and citations omitted). Indeed, the Government openly admits that on its theory, tribal courts may hear any tort claim "occurring on tribal land and arising out of ongoing consensual commercial relationships with the tribe" or its

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[4] Similarly, the sole condition for a business license is "the payment of tax accruing to the" Tribe. Pet. App. 76-77 n.1 (quoting Tribal Code § 14-1-3(1)).

members. U.S. Br. 14. As a practical matter, that would mean that tribes may treat nonmembers engaged in commercial activity on a reservation in the same way they regulate their own members. If the first *Montana* exception is, indeed, a "'limited' one[]," *Plains Commerce Bank*, 554 U.S. at 330 (citation omitted), the Government's theory must be rejected.

The Court should retain the limited nature of the first *Montana* exception by requiring that the tribal regulation take a form that avoids the "risk of subjecting nonmembers to tribal regulatory authority without commensurate consent," as do tax codes, licensing regulations, and written contracts. *Plains Commerce Bank*, 554 U.S. at at 337; *see* Pet. 18-24; Cert. Reply 10-12. The Government argues that tort claims are not "categorically different" from contract claims because "contract law is often equally unwritten." U.S. Br. 14-15. But the substantive obligations enforced in contract actions generally *are* written and, more importantly, are *always* knowingly consented to ex ante.

Moreover, the problem with tort law is not simply that it is unwritten. *Contra* U.S. Br. 14-15. Tort claims also are different in kind because they address virtually every area of human activity, in stark contrast to the delimited "taxation, licensing," and contract claims contemplated by the Court in *Montana*. *See* 450 U.S. at 565-66. To say that tribes have authority to apply their tort law against those who engage in consensual relationships with tribe members is to say that tribes have pervasive authority to regulate nearly every aspect of nonmembers' on-reservation conduct.

Finally, tort law, even when codified, tends to be vague, relying on the judgment of particular juries in individual cases to provide critical content. For that reason, it is particularly concerning that the jurors and judges in tribal courts belong to the same polity as the plaintiff, while the defendant is an outsider who has "no part in tribal government" and "no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337.[5] After all, limitations on tribal jurisdiction are a central part of the "constitutional structure and the consent upon which it rests," intended to protect the "political freedom [that is] guaranteed to citizens by the federal structure." *Lara*, 541 U.S. at 213-14 (Kennedy, J., concurring in the judgment).

Petitioners' position does not "[d]epriv[e] tribes of [a] quintessentially American form of lawmaking authority" or "threaten tribal self-rule." U.S. Br. 16 (internal quotation marks and citation omitted). When engaging in truly "*self*-rule" by regulating their own members, tribes are free to create law by whatever manner they wish. At the same time, petitioners do not contest tribes' authority to apply tort law to conduct that "threatens or has some direct

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[5] The Government says this should cause no concern because any Due Process violation might prevent enforcement of the judgment in state or federal court, and because Congress could provide direct review of tribal judgments in federal court if it so chose. U.S. Br. 20-21. The first solution is expensive and no help for businesses that have on-reservation assets that can be seized without resort to state or federal courts. The second argument could be made against any of this Court's cases recognizing limits on tribes' inherent authority.

APPENDIX

effect on the political integrity, the economic security, or the health or welfare of the tribe" under the second *Montana* exception. 450 U.S. at 565-66; *see Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 937-38 (8th Cir. 2010). But when a tribe's assertion of authority over a nonmember is premised on consent rather than the need to protect the tribe, the tribe must provide nonmembers the kind of advance notice of their obligations and potential liabilities afforded by tax laws and licensing schemes but not tort law or tribal tradition.

If broader tribal jurisdiction is warranted, it should be provided by Congress, not the courts. Congress has shown itself more than willing to expand tribal jurisdiction when the need is demonstrated. *See* 25 U.S.C. §§ 1301(2), 1304(a).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, cert. reply brief, and the *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2015

APPENDIX A

Excerpts of Lease Between Choctaw Shopping Center Enterprise And Petitioner Dolgencorp, Inc.

D. Ct. Doc. 1-2

LEASE

PARTIES. THIS LEASE, made and entered into this 7th day of November 2000 by and between Choctaw Shopping Center Enterprise, (hereinafter called "Lessor"), and Dolgencorp, Inc., (hereinafter called "Lessee").

WITNESETH

* * *

XXVIII. COMPLIANCE WITH LAWS. Lessor shall, at Lessor's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to the physical or environmental conditions of the Shopping Center or the demised premises, including without limitations laws and regulations pertaining to disabled persons, asbestos, radon and hazardous substances. In the event asbestos or any other materials deemed hazardous by a governing authority (provided such hazardous material has not been introduced by Lessee) is required by law to be removed from the demised premises, Lessor shall perform such removal at its own cost and expense. Lessee shall, at Lessee's sole cost and expense, comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable

and pertain to Lessee's specific use of the demised premises.

* * *

XXVII. GOVERNING LAW. This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act. Nothing contained in this agreement or any related document shall be construed or deemed to provide recourse to Silver Star assets.

XXIX. SPECIAL PROVISIONS. The Lessee by the acceptance of this Lease acknowledges that the demised premises and the aforementioned ground lease are upon land held in Trust by the United States of America for the Mississippi Band of Choctaw Indians. Lessee further acknowledges that because said property is held in trust status, the following provisions shall apply:

* * *

C. The Lessee agrees that it will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

* * *

AMICUS CURIAE BRIEF

No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL., PETITIONERS

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a tribal court has jurisdiction to adjudicate civil tort claims brought by tribal members against a nonmember corporation that operates a store on tribal trust land pursuant to a lease with, and business license from, the Tribe, when the claims arise from the store manager's alleged assaults upon a tribal member who was, pursuant to an agreement with the Tribe, working at the store as an intern.

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In the Supreme Court of the United States

No. 13-1496

DOLLAR GENERAL CORPORATION, ET AL., PETITIONERS

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government" through means including the "development" of "[t]ribal courts." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. Petitioners are a Tennessee corporation and its wholly owned subsidiary. Pet. Br. ii; J.A. 20. The subsidiary, Dolgencorp, LLC, operates a Dollar General Store on land held in trust for, and within the Reservation of, the Mississippi Band of Choctaw Indians (the Tribe). Pet. App. 2. Dolgencorp operates the store pursuant to a business license issued by the Tribe and

has leased the premises since 2000 from an entity owned by the Tribe. *Id.* at 2, 84; J.A. 28.

In the lease, Dolgencorp "acknowledges" that the premises "are upon land held in Trust by the United States of America for the [Tribe]" and that Dolgencorp "will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose." J.A. 48-49 (Provision XXIX). The lease provides that Dolgencorp "shall * * * comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (Provision XXVIII). The lease further provides that "[t]his agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi"[1]; that "[e]xclusive venue and jurisdiction shall be in the Tribal Court"; and that "[t]his agreement and any related documents is [*sic*] subject to the Choctaw Tribal Tort Claims Act." J.A. 47-48 (Provision XXVII).

In spring 2003, the store's non-Indian manager, Dale Townsend, agreed that the store would participate in the Tribe's Youth Opportunity Program, which placed young tribal members in short-term positions with local businesses. Pet. App. 2-3, 5. Respondent John Doe, a 13-year-old tribal member, participated in the Youth Opportunity Program at the store. *Id.* at 3.

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[1] Section 1-1-4 of the Choctaw Tribal Code (2013) generally provides that, in civil actions, "[a]ny matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi." The entire code is available at www.choctaw.org/government/court/code.html.

Doe alleges that, while they were working in the store on July 14 and 15, 2003, Townsend made multiple uninvited sexual advances against Doe, offering Doe money to allow the advances, grabbing him "in his crotch area" until he escaped, and thereafter continuing to make sexually offensive remarks. J.A. 13. In light of the allegations, the Tribe sought an order from the Choctaw Tribal Court excluding Townsend from the Reservation, and, with Townsend's consent, the court entered such an order in September 2003. Pet. App. 57; D. Ct. Doc. 1-2, at 16-19 (Mar. 10, 2008).

2. a. In January 2005, Doe, by and through his parents (also tribal members), filed a complaint against Townsend and Dolgencorp in the Civil Division of the Choctaw Tribal Court, seeking compensatory and punitive damages for severe mental trauma resulting from the alleged assaults. Pet. App. 3, 77. The complaint claims that Dolgencorp is vicariously liable for Townsend's actions and that it was negligent in hiring, training, or supervising him. *Id.* at 3.

Defendants moved to dismiss the complaint for lack of jurisdiction under *Montana* v. *United States*, 450 U.S. 544 (1981), which provides that tribes generally lack authority to regulate the activities of nonmembers, at least on non-Indian fee land within their reservations, subject to the following two exceptions: (1) that "[a] tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health

or welfare of the tribe." *Id.* at 565-566. Defendants contended that neither of those exceptions applies here. D. Ct. Doc. 1-2, at 27-28, 32. The tribal court denied their motion to dismiss. Pet. App. 3, 78.

b. On interlocutory appeal, the Choctaw Supreme Court affirmed. Pet. App. 75-91. Although *Montana* had originally addressed only activities on non-Indian fee lands, the court concluded that *Nevada* v. *Hicks*, 533 U.S. 353 (2001), had "morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons*, where place was still relevant, but not determinative or dispositive." Pet. App. 82-83. In that light, the court held that the tribal court had jurisdiction under both *Montana* exceptions. *Id.* at 82-90. With respect to the consensual-relationship exception, the court identified three agreements between Dolgencorp and the Tribe: the lease, the business license authorizing operation of the store, and the agreement to participate in the Youth Opportunity Program. *Id.* at 86. The court further found that there was a "considerable nexus between the alleged tort and the commercial lease" because the tort was committed by the manager of the leased premises, *ibid.*, and that the nexus was made tighter because the victim was not simply a customer or employee but a "[t]ribal minor placed at the store by the Tribe to receive job training," *ibid.*

3. Petitioners and Townsend then filed this action in the United States District Court for the Southern District of Mississippi, seeking injunctive relief barring the tribal-court proceedings. Pet. App. 55. The court granted a permanent injunction as to Townsend, finding that he was not a party to any consensual relationship sufficient to support tribal-court jurisdiction. *Id.*

at 71-73. Following discovery, the remaining parties filed cross-motions for summary judgment. *Id.* at 39-40. They agreed that, because the tribal-court defendants are nonmembers, one of *Montana*'s "two exceptions must apply in order for the Tribe to assert regulatory authority over their actions." *Id.* at 43.

The district court held that the case against petitioners falls within *Montana*'s consensual-relationship exception. Pet. App. 45-54. The court found a consensual relationship by virtue of petitioners' agreement to participate in the Youth Opportunity Program, pursuant to which Doe "functioned as an unpaid intern or apprentice" providing "free labor" to petitioners, and determined that petitioners "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." *Id.* at 46. The court further concluded that Doe's claims "arise directly from this consensual relationship" and there is therefore "a sufficient nexus between the consensual relationship and exertion of tribal authority." *Ibid.*

4. a. The court of appeals affirmed. Pet. App. 1-22. In finding *Montana*'s consensual-relationship exception applicable, the court rejected five arguments made by petitioners. First, it found that, although the consensual relationship need not be a "commercial" one, the relationship here was "unquestionably" commercial in nature. *Id.* at 12.

Second, the court of appeals identified an "obvious" nexus between petitioners' consensual participation in the Youth Opportunity Program and Doe's tort claims, because the Tribe was regulating "the safety of the child's workplace." Pet. App. 13. The court concluded that it "makes no difference" that "the regulation takes the form of a tort duty that may be vindicated * * * in

tribal court." *Ibid.* To the extent "foreseeability" is relevant, the court observed it "would hardly be surprising" that an employer would "have to answer in tribal court for harm caused to the child in the course of his employment," and, more specifically, that petitioners could have easily anticipated that sexual molestation of an intern by a store manager "would be actionable under Choctaw law." *Id.* at 13-14 & n.4.

Third, the court of appeals rejected petitioners' contention that *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), had limited tribal-court jurisdiction to situations where "one specific relationship, in itself" (Pet. App. 16)—such as the single employment relationship between Doe and Dolgencorp—can be shown to "intrude on the internal relations of the tribe or threaten tribal self-rule." *Plains Commerce Bank*, 554 U.S. at 334-335. The court explained that "at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." Pet. App. 16.

Fourth, because the argument was asserted for the first time on appeal and therefore waived, the court of appeals declined to entertain petitioners' contention that Doe failed to allege and prove that any negligence in hiring, training, or supervising Townsend had occurred on the Reservation. Pet. App. 19-20.

Fifth, the court of appeals held that, even though tribes generally lack criminal jurisdiction over non-Indians, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978), they are not "categorically prohibited from imposing punitive damages on non-

members," because punitive damages are distinct from criminal punishment. Pet. App. 20-22.

b. Judge Smith dissented. Pet. App. 22-36. In his view, the *Montana* exceptions are not satisfied because "Dolgencorp's conduct indisputably falls outside the [Tribe's] authority to 'protect tribal self-government or to control internal relations.'" *Id.* at 27 (quoting *Montana*, 450 U.S. at 564). Judge Smith further reasoned that, even if the consensual-relationship exception applies, there was no "legally sufficient nexus between Dolgencorp's participation in a short-term, unpaid internship program and the full body of Indian tort law." *Id.* at 28. He concluded that "*Montana*'s first exception envisages discrete regulations consented to *ex ante*" rather than an "after-the-fact imposition of an entire body of tort law." *Id.* at 32.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the tribal court has jurisdiction over the civil tort claims against petitioners, which are based on conduct that occurred on tribal trust land and arose from petitioners' operation of a store pursuant to a lease with, and business license from, the Tribe, as well as from the store's voluntary participation in the Tribe's Youth Opportunity Program.

A. Tribal-court jurisdiction is consistent with the framework established in *Montana* v. *United States*, 450 U.S. 544 (1981).

1. Under the first exception to *Montana*'s general rule against jurisdiction over nonmembers, "[a] tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 565. Petitioners had such a relationship, reflected in three separate agreements

with the Tribe, including a lease in which Dolgencorp agreed to comply with tribal law, which expressly contemplates tribal-court jurisdiction over civil actions arising from on-reservation business or activity. The allegedly tortious conduct had an obvious connection to that consensual relationship, and the ability to protect tribal members from physical assaults on tribal land serves the Tribe's legitimate sovereign interests.

2. In the alternative, the Court could find that jurisdiction was appropriate under the portion of *Montana* that "readily agree[d]" with the exercise of tribal jurisdiction over nonmember activities on tribal land (as opposed to on land held in fee by nonmembers), 450 U.S. at 557, since the non-Indian defendants were not transient visitors but operators of an established business.

B. The Court should reject petitioners' request for a categorical carve-out from tribal-court jurisdiction of claims sounding in tort. The Court has previously endorsed tribal courts' jurisdiction over tort claims, and the federal courts of appeals and district courts, state courts, and tribal courts have consistently rejected, either expressly or implicitly, the premise that tort claims against nonmembers are somehow inherently unsuited for tribal-court jurisdiction. Petitioners contend that uncodified tort law is harder to discern than other kinds of law, but it was easy to foresee that the Tribe would seek to hold an employer liable for a sexual assault committed against an intern by a supervisor in one of its stores.

C. Nor should the Court repudiate the settled distinction it has long drawn between tribal jurisdiction in criminal and civil cases. Because petitioners' contrary argument was not raised below, and was characterized

as outside the question presented in petitioners' certiorari-stage briefs, the Court should decline to reach it. In any event, the argument lacks merit. Although the Court has concluded that Congress must affirmatively authorize tribes' exercise of criminal jurisdiction over nonmembers, it has declined to extend that framework to the civil context and observed that there are critical differences between criminal and civil jurisdiction. Petitioners' historical analysis does not demonstrate that the Court has erred in that regard.

Consistent with the Court's jurisprudence, Congress has continued to "recognize[] tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6). The Court should not effectuate the fundamental transformation of civil jurisdiction that petitioners seek when Congress has continued to endorse tribal courts' ability to resolve disputes arising on reservations, including those involving non-Indians.

D. Petitioners suggest, based on a cursory and selective literature review, that tribal courts are incompetent and biased against nonmembers. But, partly because of federal support, many tribal courts are effectively administering justice. Petitioners' concerns are more appropriately addressed by Congress and are particularly unpersuasive in the context of this case, which involves a well-developed tribal court and a widely recognized tort claim. Even without congressional action, nonmembers have other means to avoid unfair treatment.

ARGUMENT

THE TRIBAL COURT HAS JURISDICTION OVER THE CLAIMS AGAINST PETITIONERS, WHICH ARISE OUT OF THEIR CONDUCT ON TRIBAL LAND IN CONNECTION WITH THEIR CONSENSUAL RELATIONSHIP WITH THE TRIBE

At the certiorari stage, petitioners presented this case as an opportunity to answer the question they believed the Court wished to decide in *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008): "whether tribal courts may adjudicate tort claims against nonmembers pursuant to their authority under the first *Montana* exception." Cert. Reply Br. 1; see Pet. 12-13; Pet. Supp. Br. 1. The Court should not adopt petitioners' categorical restriction on tribal-court jurisdiction over tort claims, which petitioners now relegate to secondary status (Br. 47-58). It should instead affirm that the tribal court has jurisdiction over assault claims arising from the consensual relationship between petitioners and the Tribe, as reflected in three separate agreements associated with operating a store and supervising a tribal-member intern on the Tribe's own land.

Petitioners' new lead argument (Br. 20-47) is even more sweeping and groundless: that tribal courts lack jurisdiction over virtually all civil claims against nonmembers, except where expressly authorized by Congress. The Court has rejected prior attempts to extend such a rule from the criminal to the civil context. If the Court addresses that argument, it should again refuse to effect such a sea-change in its jurisprudence —jurisprudence on which Congress has long relied in supporting tribal courts as "the most appropriate forums for the adjudication of disputes affecting personal

and property rights on Native lands," 25 U.S.C. 3651(6).

A. Under *Montana*, A Tribal Court May Exercise Jurisdiction Over A Claim Against A Nonmember Arising Out Of Its Operation, Pursuant To Agreements With The Tribe, Of A Store On The Tribe's Own Land

Although petitioners repeatedly assert (*e.g.*, Br. 2, 20, 23, 37, 58) that Indian tribes now possess only those aspects of sovereignty that Congress has expressly granted, the Court recently reaffirmed the error of that view. Tribes are, of course, subject to Congress's "plenary control," but, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Thus, the Court has repeatedly recognized that tribes "retain considerable control over nonmember conduct on tribal land." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997). By contrast, tribes generally "lack civil authority over the conduct of nonmembers on non-Indian land within a reservation," but that rule is "subject to two exceptions." *Id.* at 446. Those two exceptions were articulated in *Montana* v. *United States*, 450 U.S. 544 (1981). The first exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Moreover, "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate*, 520 U.S. at 453 (brackets and internal quotation marks omitted).

Applying those principles, the court of appeals correctly concluded that the tribal court has jurisdiction to hear the claims against petitioners because the allegedly tortious conduct occurred on tribal trust land and arose from a consensual relationship that satisfies *Montana*'s first exception.

1. Tribal-court jurisdiction in this case is appropriate under Montana's *consensual-relationship exception*

a. Petitioners do not dispute that they had a consensual relationship with the Tribe. Nor can they dispute that the relationship developed in the "private commercial" context most closely associated with *Montana*'s first exception. *Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001). The relationship was reflected in the lease for the store's premises, which specifically provided that Dolgencorp was required to comply with current and future federal and tribal law; it was reflected in the business license that Dolgencorp obtained from the Tribe to operate the store; and it was reflected in the agreement to participate in the Tribe's Youth Opportunity Program, which placed a 13-year-old tribal member under the supervision of the store manager. Pet. App. 2-3, 5, 45-46, 86; see pp. 2-3, *supra*.

Petitioners suggest that the consensual-relationship exception is "[n]arrow" and entails a stringent test for specific consent, akin to that needed to waive a federal statutory right to a judicial forum. Pet. Br. 44-45, 48-49. But that proposition is not supported by *Montana*'s focus on the existence of a relationship that is consensual in nature, rather than specific consent to the regulation in question. In any event, petitioners acknowledge that, even under their theory, consent may be express or "implicit[]," and it may be reflected either in documents or in "conduct." *Id.* at 48, 50; see

Plains Commerce Bank, 554 U.S. at 337 (noting a nonmember may consent "either expressly or by his actions"); *Hicks*, 533 U.S. at 372 (parties' dealings may "expressly or impliedly confer tribal regulatory jurisdiction over nonmembers").

Here, petitioners plainly consented to the Tribe's regulatory and adjudicatory jurisdiction. As a condition of leasing the premises from the Tribe, Dolgencorp acknowledged that it would "comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (Provision XXVIII). The Choctaw Tribal Code—one of the tribal laws with which Dolgencorp agreed to comply—provides that the Tribe's courts may exercise jurisdiction "in civil cases" over claims arising from the conduct of non-Indians within the Choctaw Indian Reservation where the defendant has "significant minimum contacts on or with the Reservation," unless the dispute involves or affects only non-Indian parties. Choctaw Tribal Code §§ 1-2-1 and 1-2-2 (2013). It further provides that the Tribe's courts have civil jurisdiction over any persons who commit tortious acts within the Choctaw Indian Reservation and over "any civil cause of action" that "aris[es]" from "business or activity" "conduct[ed] within the Choctaw Indian reservation." *Id.* § 1-2-3(2)(c) and (g). Petitioners thus agreed that, if the store's premises were used for tortious activities involving a tribal member, any resulting civil claims could be brought in the tribal court.

b. Of course, the existence of a consensual relationship with a tribe will not support just any civil action. The tribal regulation must "have a nexus to the consen-

sual relationship itself." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001). Here, the court of appeals appropriately found an "obvious" connection between the Tribe's Youth Opportunity Program and the tort allegedly committed by the store supervisor against the intern who worked in the store pursuant to the program. Pet. App. 13. That conclusion required no leap from "[a] nonmember's consensual relationship in one area" to "tribal civil authority in another" area. *Atkinson Trading*, 532 U.S. at 656. The victim was not a "stranger[]" to the relationship (*ibid.* (citation omitted)) but the intended beneficiary of the store's consensual participation in the Tribe's program.

c. Finally, the consensual-relationship exception "permit[s] tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332. That requirement is satisfied here for two independent reasons. First, the conduct occurred on tribal land. It therefore directly implicated the Tribe's sovereign power to "manag[e]" and "superintend" tribal land and thus to "set conditions on entry" to its land. *Id.* at 334, 336, 337. Cf. J.A. 49 (lease Provision XXIX, reflecting that premises could not be used "for any unlawful conduct or purpose"). Petitioners assert (Br. 57) that those powers involve only such matters as "the sale of tribal land, the extraction of reservation resources, or the zoning of property." But *Plains Commerce Bank* also referred to "licensing requirements and hunting regulations." 554 U.S. at 335. A tribe surely has as much sovereign interest in protecting its members from physical assaults as it does in protecting its wild game from unlicensed hunting.

Second, *Plains Commerce Bank* explained that the consensual-relationship exception was designed to capture "regulation of non-Indian activities on the reservation that ha[ve] a discernible effect on the tribe or its members," including, for instance, "a contract dispute arising from the sale of merchandise * * * to an Indian on the reservation." 554 U.S. at 332. Again, a physical assault has as discernible an effect on a tribal member as a contract dispute. Moreover, *Plains Commerce Bank* also identified "a business enterprise employing tribal members" as a kind of "activit[y] on non-Indian fee land" that "[t]he logic of *Montana*" would allow a tribe to regulate. *Id.* at 334-335.

The Court's analysis squarely applies here: An alleged assault on tribal land against a tribal member arising out of a consensual commercial relationship with the Tribe and its member falls within the Tribe's regulatory power under *Montana*'s consensual-relationship exception.

2. Tribal-court jurisdiction is also consistent with Montana because the conduct at issue occurred on the Tribe's own land

Except to the extent that petitioners now seek a categorical carve-out for all tort claims or even all civil claims, the courts below and the parties have generally assumed that any tribal-court jurisdiction over petitioners, as nonmembers, must satisfy one of the *Montana* exceptions. Pet. App. 9-10, 42-43. Yet, as the United States explained in its petition-stage response to the Court's invitation (at 9-12), jurisdiction could also be based on *Montana*'s "read[y] agree[ment]" that a tribe may regulate nonmembers' activities on its own land, 450 U.S. at 557, at least where petitioners were not merely transient visitors but the operators of an

established business on the Tribe's land. This argument was not pressed or passed upon as a distinct ground below, and need not be resolved as such by the Court. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992). But the Court could clarify the ambit of *Montana*'s general rule and its exceptions by considering this further argument for affirmance, see *United States* v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994), or at least by underscoring the great weight that the tribal-land situs must play in the analysis.[2]

This Court in *Montana* "readily agree[d]" that the tribe had jurisdiction over tribal land (whether owned by the tribe or held by the United States in trust for the tribe), and the rest of the Court's discussion—including the general rule limiting tribal authority over nonmembers' activities and its two exceptions—applied only to the "remain[ing]" dispute about activities on "land owned in fee by nonmembers of the [t]ribe." 450

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[2] Unlike petitioners' proposed proscription on virtually all jurisdiction over civil claims (see p. 25, *infra*)—which would be an alternative basis for *reversal*—this argument was clearly preserved at the certiorari stage (see Br. in Opp. 7 n.12) and has occasioned disagreement in the courts of appeals. See *Water Wheel Camp Recreational Area* v. *LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that "tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*," where nonmembers' activity "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play"). But see *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (applying *Montana*-exception analysis to "both Indian and non-Indian land"), cert. denied, 562 U.S. 1179 (2011); *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1069-1070 (10th Cir. 2007) (same), cert. denied, 552 U.S. 1181 (2008).

U.S. at 557. One year after *Montana*, the Court confirmed that, even if a tribe's authority to tax non-Indian extraction of oil and gas on tribal trust property were based only on its "power to exclude nonmembers from tribal lands," that would include the power to place new conditions "on reservation conduct." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144-145 (1982). Because that power "derives from sovereignty itself," it can be exercised without securing "consent" from the non-Indians on tribal land. *Id.* at 147.

In *Strate*, the Court again described *Montana*'s "main rule and exceptions" as "[r]egarding activity on non-Indian fee land." 520 U.S. at 453. The dispute in *Strate* was "govern[ed]" by *Montana* only because the state highway at issue (the location of an accident giving rise to tort claims) was "equivalent, for nonmember governance purposes," to "land alienated to non-Indians." *Id.* at 454, 456. Similarly, in *Atkinson Trading*, the Court applied what it described as "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land." 532 U.S. at 654.

One month after *Atkinson Trading*, however, the Court's decision in *Hicks* stated that *Montana* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." 533 U.S. at 360. But the Court still acknowledged that a tribe's ownership and control of the land on which the activities in question occur is a "significant," and may sometimes be a "dispositive," factor. *Id.* at 370-371. Such ownership was not sufficient to establish tribal jurisdiction in the narrow context of that case, which involved the activities of state law-enforcement officers executing search warrants relating to off-reservation violations of state law. *Ibid.*; see *id.* at 358 n.2 ("Our holding in this case

is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

Most recently, *Plains Commerce Bank* described *Montana*'s rule in terms similar to those used in *Hicks*. 554 U.S. at 328, 330. But it also reiterated that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation" and that a tribe loses "*plenary* jurisdiction" over tribal land if it is "converted into fee simple." *Id.* at 327, 328 (emphasis added); *id.* at 327 ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe.") (quoting *Hicks*, 533 U.S. at 392 (O'Connor, J., concurring in part and concurring in the judgment)). Thus, in addition to "interests in protecting internal relations and self-government," tribes retain "inherent sovereign authority to set conditions on entry" and otherwise "superintend tribal land," *id.* at 336, 337—the same powers that supported the tax in *Merrion* irrespective of consent.

Accordingly, tribal-court jurisdiction in this case could be predicated on a conclusion that *Montana*'s general rule limiting tribal regulatory authority over nonmembers does not apply to claims such as those at issue here, which are brought against private defendants and arise out of an ongoing business on tribal trust land pursuant to a lease and license from the Tribe.

B. The Court Should Not Categorically Remove Tort Claims From The Jurisdiction That Tribal Courts Otherwise Possess Under *Montana*

Petitioners contend (Br. 47-58) that, even where a tribe would otherwise have civil regulatory jurisdiction over a nonmember under *Montana*, that regulation cannot take the form of uncodified tort law.

1. The Court has previously endorsed tribal-court jurisdiction over tort claims

Petitioners' proposed categorical exclusion of tort claims cannot be reconciled with express statements in some of this Court's cases, and accepting its premise would have radically altered the analysis in others. In *Hicks* itself, the Court recognized (in discussing *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 482 n.4 (1999)) that "there was little doubt that the tribal court had jurisdiction over [Navajo-law] tort claims" arising from nonmembers' uranium mining and processing on tribal lands, until that jurisdiction was affirmatively withdrawn by Congress. 533 U.S. at 368. In other words, petitioners get it exactly backward: Congress did not need to confer tort-claim jurisdiction on the Navajo court.

Similarly, the Court's seminal decision concerning exhaustion of tribal-court remedies considered a personal-injury claim arising from a motorcycle accident — indeed one that occurred on non-Indian land. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 847 (1985). The Court specifically rejected the argument that the tribal court's "civil subject-matter jurisdiction over non-Indians in a case of this kind" should be "automatically foreclosed." *Id.* at 855. Subsequently, both *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), and *Strate* also involved tort claims, and in neither did the Court suggest anything like the categorical bar petitioners now urge.

Neither have other courts considering tort claims. The courts of appeals have consistently rejected, either expressly or implicitly, the premise that tort claims against nonmembers are inherently unsuited for tribal-

court jurisdiction.[3] District, state, and tribal courts also have often found that, when jurisdiction over the parties is otherwise warranted, it is not defeated by the presence of tort claims against nonmembers.[4]

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[3] See *Attorney's Process & Investigation Servs.*, 609 F.3d at 938 (concluding that, if tribe has "power under *Montana* to regulate" conduct, it makes no "difference whether it does so through precisely tailored regulations or through tort claims"); see also *DISH Network Serv. L.L.C.* v. *Laducer*, 725 F.3d 877, 885 (8th Cir. 2013) (requiring tribal-court exhaustion of jurisdictional question because "[i]t is not 'plain' that a tribal court lacks authority to exercise jurisdiction over tort claims closely related to contractual relationships between Indians and non[-]Indians on matters occurring on tribal lands"); *Elliott* v. *White Mountain Apache Tribal Ct.*, 566 F.3d 842, 845 & n.2, 849-850 (9th Cir.) (finding tribal-court jurisdiction over common-law negligence and trespass claims against nonmember to be sufficiently "plausible" to require exhaustion in tribal court), cert. denied, 558 U.S. 1024 (2009); *MacArthur*, 497 F.3d at 1062, 1071-1074 (finding no tribal-court jurisdiction over tribal members' claims, including several common-law tort claims, against their employer because the alleged consensual relationship was with a state agency, not a private party); *McDonald* v. *Means*, 309 F.3d 530, 538-540 (9th Cir. 2002) (holding, without considering *Montana* exceptions, that tribal court had jurisdiction over tort claims against nonmembers arising from accident on tribal land).

[4] See, *e.g.*, *State Farm Ins. Cos.* v. *Turtle Mountain Fleet Farm LLC*, No. 12-CV-94, 2014 WL 1883633, at *11 (D.N.D. May 12, 2014) (holding tribal court had jurisdiction over bad-faith claim against nonmember, whether characterized as contract or tort claim); *Diepenbrock* v. *Merkel*, 97 P.3d 1063, 1064, 1067-1068 (Kan. Ct. App. 2004) (holding tribal court had jurisdiction over wrongful-death and negligence claims against nonmembers for acts in casino on land owned by tribe); *Doe BF* v. *Diocese of Gallup*, 10 Am. Tribal Law 72, 78-80 (Navajo 2011) (holding tribal-court jurisdiction over personal-injury claims against nonmembers arising from sexual assault would depend on location of conduct and application of *Montana*); *Marathon Oil Co.* v. *Johnston*, No. AP-04-003,

2. Withdrawing tort jurisdiction would threaten tribes' legitimate sovereign interests

Under *Montana*, a tribe "may *regulate*, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 565 (emphases added). Common-law tort remedies are a well-established means of regulation, see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008), and there is no good reason to strip that means of regulation from tribes—especially here, where there is no surprise in the prospect that an employer doing business under a tribal lease on tribal land may be liable for its supervisor's sexual assaults on an intern in the workplace.

a. Petitioners note (Br. 50, 55) that the cases cited in *Montana* involved tax or contract disputes. In their view, "tort law is fundamentally different" because it is harder for nonmembers "to discern." Pet. Br. 52, 53. But that is a red herring. A contract dispute, like one about a statutory or regulatory scheme, may well involve uncertainty about the precise content of the underlying legal obligations. Indeed, that is often why there is a *dispute* requiring judicial resolution, often after briefing in which the parties express differing views about the law (as well as the facts). Indeed, basic principles of tort law—like the wrongfulness of sexually assaulting a minor or the need to exercise reasonable care to protect others from being injured by one's agents—may be more readily knowable than even the most detailed written prescriptions. Cf. *Nautilus, Inc.*

2006 WL 6926419, at *1, *3 (Shoshone & Arapaho Tribal App. Ct. Apr. 6, 2006) (holding tribal court had jurisdiction over negligence claims against nonmember arising from its operation of oil well leased from tribe).

v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2128 (2014) (noting "the inherent limitations of language"). Here, in particular, there is no suggestion that proving a breach of duty to refrain from sexual molestation would require resort to "unique customs, languages, and usages" of the Tribe, Pet. Br. 53 (quoting *Duro* v. *Reina*, 495 U.S. 676, 693 (1990)).

b. Petitioners further contend (Br. 55) that tort law is so "pervasive" that it would allow tribes to regulate "nearly everything a nonmember does on a reservation." But, as discussed above, regulation under the first *Montana* exception must "have a nexus to the consensual relationship." *Atkinson Trading*, 532 U.S. at 656. Where the allegedly tortious conduct arises out of the circumstances created by the nonmembers' agreements to operate a store on the Tribe's land and employ a young tribal member, the Tribe is not "imposing tort regulation on nearly everything a company does on [the] reservation." Pet. Br. 56. Nor is the power to proscribe workplace assaults any more sweeping than the ability to prescribe other conditions of employment for tribal members employed by a non-Indian corporation.

c. Finally, petitioners contend (Br. 56) that tort law differs from other forms of law because it is not related to tribes' "sovereign interests [in] managing tribal land, protecting tribal self-government, and controlling internal relations." Pet. Br. 56 (quoting *Plains Commerce Bank*, 554 U.S. at 335). As explained above, however, protecting tribal members from assault, especially on the tribe's own land, does implicate the sovereign interests discussed in *Plains Commerce Bank*. See pp. 14-15, *supra*.

That conclusion is supported by *Williams* v. *Lee*, 358 U.S. 217 (1959), the contract-law case cited in *Montana*'s description of the consensual-relationship exception, 450 U.S. at 565. In *Williams*, the Court held that a non-member who operated a store on the Navajo Reservation could not bring an action in state court against a tribal member to collect for goods purchased on credit. 358 U.S. at 217-218, 223. The Court explained that state-court, rather than tribal-court, jurisdiction over such a transaction "would infringe on the right of the Indians to govern themselves." *Id.* at 223; see *Kennerly* v. *District Ct.*, 400 U.S. 423 (1971) (per curiam) (finding tribal-court had exclusive jurisdiction over action filed against Indian by non-Indian owner of store on non-Indian fee land within Blackfeet Indian Reservation).[5]

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[5] Petitioners suggest (Br. 51 n.34) that *Williams* differs because the nonmember was the plaintiff, and, in their view, the nonmember may expressly consent to tribal-court jurisdiction. But the point of *Williams* for present purposes was that the dispute arising from the transaction was within "the authority of Indian governments over their Reservations." 358 U.S. at 223.

Petitioners also attempt (Br. 51 n.34) to distinguish *Williams* on the ground that the Navajo tribal court was a Court of Indian Offenses. Such courts are established by the Department of the Interior, see 25 C.F.R. Pt. 11, but *Williams* might still have viewed the tribal court as being tribal in the relevant sense, rather than federal. See *Wheeler*, 435 U.S. at 327 n.26 (declining to decide, for double-jeopardy purposes, whether such courts are arms of the federal government or derive from tribes' inherent sovereignty); *Secretary's Power to Regulate Conduct of Indians*, 1 Op. Solicitor of the Dep't of the Interior Relating to Indian Affairs 531, 536 (Feb. 28, 1935) ("[Courts of Indian offenses] are manifestations of the inherent power of the tribes to govern their own members."). Moreover, the Blackfeet tribal court in *Kennerly* was *not* a Court of Indian Offenses.

The same would be true if, as petitioners suggest (Br. 43), the governing tribal law could be applied to nonmembers only by federal or state courts. Depriving tribes of the quintessentially American form of articulating and applying their tort law in a common-law manner—even in circumstances that involve activities on tribal trust land and nonmembers' consensual relationships with the tribe—would directly "infringe[] upon tribal lawmaking authority" by sidelining the very entities, tribal courts, that "are best qualified to interpret and apply tribal law." *Iowa Mutual*, 480 U.S. at 16. That would invade another sovereign interest by "threaten[ing] tribal self-rule." *Plains Commerce Bank*, 554 U.S. at 335.

The Court should not accept petitioners' invitation to effect such sweeping changes in the law by categorically withdrawing tribal courts' jurisdiction over tort claims.

C. The Court Should Not Abandon Its Settled Distinction Between Tribes' Criminal And Civil Jurisdiction

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes were long ago deprived of their power to exercise criminal jurisdiction over non-Indians who commit crimes on the reservation. In 1990, it extended that reasoning to criminal jurisdiction over Indians who are members of other tribes. See *Duro*, *supra*. Petitioners now ask (Br. 23-47) the Court to extend that reasoning from the criminal to the civil context and find that any civil adjudicatory jurisdiction over nonmembers must be newly recognized by Congress (or by the nonmember's express and specific consent). The Court should not declare that more than three decades of its jurisprudence about tribal jurisdiction has largely been for

naught—especially when that jurisprudence has provided the backdrop for Congress's continuing efforts to strengthen tribal courts' ability to adjudicate civil disputes arising on reservations.

1. Petitioners' alternative basis for reversal was neither pressed nor passed upon in the courts below

Unlike their tort-claim argument, which was at least briefly addressed by the court of appeals (see Pet. App. 10-11 & n.3), petitioners' broadside against virtually all civil jurisdiction was neither pressed nor passed upon below. In the court of appeals, petitioners relied on *Oliphant* only when arguing that tribal courts have no jurisdiction over *punitive-damages* claims against nonmembers, without contending that its reasoning precludes all civil claims against nonmembers for compensatory damages or other relief. Pet. C.A. Br. 37-38. Presumably for that reason, the court of appeals addressed *Oliphant* solely in the context of punitive damages. Pet. App. 20-21. That should dissuade the Court from addressing petitioners' civil-jurisdiction question. *Williams*, 504 U.S. at 41-42.[6]

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[6] The broader question about civil jurisdiction could technically be seen as included within the question presented, which referred broadly to the existence of "civil tort claims against nonmembers," Pet. i. But all three of petitioners' briefs at the certiorari stage described the case as presenting the question about tort claims. See Pet. 12 ("This case presents the Court a chance to * * * defin[e] the scope of tribal authority to adjudicate tort claims against nonmembers."); Pet. 13, 14-15; Cert. Reply Br. 1, 3; Pet. Supp. Br. 1. While petitioners mentioned uncertainty about tribal jurisdiction over all civil claims, they did not suggest that the Court would undertake to answer that larger question as well. To the contrary, they said that the case would "begin to resolve" the larger question "by deciding whether tribal courts have jurisdiction over one of the most important and recurring classes of civil litigation." Pet. 13;

2. The Court has previously declined to extend its criminal-jurisdiction framework to the civil context, and nothing warrants a different result now

If it addresses petitioners' categorical argument against civil jurisdiction, the Court should reject it.

a. Since *Oliphant*, the Court has repeatedly reaffirmed that there are critical differences between tribal courts' civil and criminal jurisdiction. "The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction." *Duro*, 495 U.S. at 687-688 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.)). Congress's actions in those two contexts have not been "comparable," *National Farmers Union*, 471 U.S. at 854, and "[t]he exercise of criminal jurisdiction * * * involves a far more direct intrusion on personal liberties," *Duro*, 495 U.S. at 688. The Court has therefore continued to "recognize broader retained tribal powers outside the criminal context," including tribal courts' power to "resolve civil disputes involving nonmembers, including non-Indians," *id.* at 687.

In particular, the Court has concluded that, precisely because "an extension of *Oliphant*" into the civil context is unwarranted, nonmember defendants in civil cases generally must exhaust their objections to tribal jurisdiction in tribal court. *National Farmers Union*, 471 U.S. at 855-857. Similarly, in *Iowa Mutual*, the Court stated that, because civil and criminal jurisdiction are not "similarly restricted," "[c]ivil jurisdiction over [non-Indians'] activities [on the tribally owned

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see Cert. Reply Br. 1 ("this case presents a subset of the broader question"); Pet. Supp. Br. 1 (answering the tort-claim question would "decide an important part" of the larger question).

reservation lands at issue there] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 15, 18; see, *e.g.*, *Strate*, 520 U.S. at 449 (noting "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings"); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (noting cases about tribal authority to "tax the activities or property of non-Indians * * * on Indian lands * * * differ sharply from *Oliphant*").

b. Indian tribes have inherent jurisdiction "over both their members and their territory." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (citation omitted); see *United States* v. *Lara*, 541 U.S. 193, 204 (2004). Petitioners' attempt to eliminate civil as well as criminal jurisdiction over nonmembers ignores the well-established territorial component of their retained sovereignty.

Although petitioners suggest (Br. 24) that their "examination of the treaties, legislation, and history" sheds new light on the purported extinguishment of civil jurisdiction in the nineteenth century, the Court has previously seen most of their material and been unmoved. Petitioners discuss several treaties. Br. 24-30. But *National Farmers Union* already recognized that treaties about the surrender of non-Indian criminal offenders "did not contain provision for tribal relinquishment of *civil* jurisdiction over non-Indians." 471 U.S. at 855 n.17 (quoting Cohen, *Handbook* at 253-254) (emphasis added). It further discussed the Attorney General opinions that petitioners invoke (Br. 27 & n.26), explaining that one "specifically noted the difference between civil and criminal jurisdiction." 471 U.S. at 853 n.15, 854-855; see 7 Op. Att'y Gen. 174, 179-181

(1855). The Court and the Attorney General emphasized that Congress had long provided for general federal *criminal* jurisdiction over offenses committed by non-Indians against Indians in Indian Country, but had never similarly provided for resolution in federal court of *civil* disputes between Indians and non-Indians. See *National Farmers Union*, 471 U.S. at 854; 7 Op. Att'y Gen. at 180 (noting, with respect to the Choctaws, that Congress had "tak[en] jurisdiction in criminal matters, and omitt[ed] to take jurisdiction in civil matters"); *id.* at 184 (neither treaty nor statute had reserved to the United States "civil jurisdiction" related to U.S. citizens).

c. Moreover, petitioners err in contending (Br. 33-35) that twentieth-century legislation indicates any understanding by Congress that tribes had previously been deprived of their civil jurisdiction over nonmembers. It is true that, in 1953, Public Law 280 provided a means for state courts to assume *civil* jurisdiction over reservation disputes (including those "between Indians" and those "to which Indians are parties"). See Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589; 28 U.S.C. 1360(a). But Congress exempted tribes with "adequate Indian forums for resolving private legal disputes," indicating that it was concerned about providing jurisdiction in an alternative forum, not withdrawing tribal civil jurisdiction. *Bryan* v. *Itasca County*, 426 U.S. 373, 383, 385-386 (1976).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, expressly provides that no tribe may "deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. 1302(a)(8) (emphasis added); see also Pet. App.

81 n.4 (quoting identical provision in Tribe's constitution). That provision is not, as petitioners suggest (Br. 34-35), limited to criminal cases or tribal members. Thus, when the Court held (two months after *Oliphant*) that tribal courts, with one exception inapplicable here, have exclusive jurisdiction to enforce the rights guaranteed by ICRA, it observed that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal *and property* interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphases added); see *Iowa Mutual*, 480 U.S. at 19 (noting, in civil case, that ICRA "provides non-Indians with various protections against unfair treatment in the tribal courts").

d. Consistent with this Court's post-*Oliphant* and post-*Montana* jurisprudence, Congress has continued to act upon that understanding, declaring that "Congress and the federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(6) (enacted in 2000); see 25 U.S.C. 3601(6) (similar finding enacted in 1993).[7] Along with the recognition that "tribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), 3651(5), that understanding has formed the backdrop for Congress's

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[7] See also S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993) (noting that Section 3601(6) "emphasize[s] that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals"); H.R. Rep. No. 205, 103d Cong., 1st Sess. 8 (1993) ("Tribes exercise a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands," and "non-Indians may be sued in tribal court.").

multiple efforts to strengthen tribal courts rather than simply shunt their cases into other forums.[8]

In practice, there is no doubt that tribal courts are exercising jurisdiction over nonmembers in civil cases, though practices vary and we have not located comprehensive data about how many such cases there are. Many tribal courts handle civil matters, including cases against non-Indians, but some "refer all matters involving non-Indians to state courts."[9] In a 2002 survey, 160 tribes estimated that a total of 85,288 civil cases were filed in their tribal courts in the previous year and that, of those, 7017 (or 8.2%) had involved a non-Indian defendant.[10] Congress has not only left the *Montana* framework in place but also taken steps to confirm that civil jurisdiction over nonmembers is appropriate.[11]

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[8] See, *e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, 450a (providing funding and assistance for tribal government institutions, including courts); Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing up to $50 million annually to assist tribal courts); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3651 *et seq.* (supplementing federal support for tribal courts); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 242, 124 Stat. 2292 (further enlarging scope of funding directive).

[9] American Indian Law Ctr., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report* 14 (2000), https://www.tribalcourtsurvey.org/_files/Survey_of_Tribal_Justice_Systems_and_CIOs_2000.pdf (*Survey of Tribal Justice Systems*).

[10] Steven W Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *2002 Census of Tribal Justice Agencies in Indian Country: Data File*, Cols. b22 & b23 (2005) (counting tribes reporting both figures), www.bjs.gov/content/pub/sheets/ctjaic02dst.csv.

[11] In 2013, Congress overturned a contrary district-court decision by clarifying that tribal courts have "full civil jurisdiction to issue and enforce protection orders involving any person," including

This Court should not effectuate the fundamental transformation of civil jurisdiction that petitioners seek when Congress has not seen fit to do so.

D. Petitioners' Policy Concerns Can Be Addressed By Congress And Be Ameliorated By Other Mechanisms

1. Petitioners' refrain (*e.g.*, Br. 2, 20, 23, 37, 58) is that tribes possess only those powers given them by Congress. There is no doubt about Congress's "plenary control" over tribes, but petitioners get the baseline wrong: "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (quoting *Wheeler*, 435 U.S. at 323).

Contrary to petitioners' cursory and selective review of certain literature, many tribal courts, including the Mississippi Band of Choctaw Indians' Tribal Court, have developed into effective institutions for administering justice and are respected by federal, state, and local governments. Petitioners do not substantiate their abstract concerns about tribal courts, much less indicate that they would suffer any injustice on account of such concerns. They raise the specter of "political interference" (Br. 4-5), but that has been found to be widely exaggerated.[12] They complain that tribal judges often lack legal training, without acknowledging that the Tribe's civil-court judges must be law-school graduates admitted to practice law in Mississippi. Choctaw

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non-Indians. 18 U.S.C. 2265(e); see S. Rep. No. 265, 112th Cong., 2d Sess. 21, 27, 36, 43 (2012). As respondents note (Br. 41-42), it would have been particularly incongruous for Congress to have taken the trouble in 1991 to overturn *Duro*'s restriction on criminal jurisdiction over Indians who are members of different tribes but not confer civil jurisdiction over such nonmembers, unless Congress understood that such civil jurisdiction already existed.

[12] *Survey of Tribal Justice Systems* vii.

Tribal Code § 1-3-3(2).[13] They complain that substance and procedure in tribal court may be foreign to them, even though this case involves allegations of conduct that would be tortious under the law of any jurisdiction, and, as is often the case, the tribal court's rules are modeled on the Federal Rules of Civil Procedure. *Id.* Tit. VI, Ch. 1.[14] In short, petitioners put forth exactly the kind of generic allegations of "local bias and incompetence" that this Court has previously rejected as the basis for "attacks on tribal court jurisdiction." *Iowa Mutual*, 480 U.S. at 18-19.

The Court should not impose novel and wholesale restrictions on tribal-court tort or civil suits on the basis of abstract and speculative assertions in briefs about what might happen in other cases. As petitioners acknowledge (Br. 41), Congress can gather information about tribal courts and devise tailored solutions to any actual problems it finds. It is the proper forum for redressing the concerns that petitioners have about the

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[13] In cherry-picking unfavorable factoids about tribal courts, petitioners oddly rely (Br. 4 n.6) on a report that more than 40% of the magistrates in Alaska's *state* courts "are *not* law trained."

[14] See generally Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 734-735 (2006) (discussing tribal-court use of Anglo-American legal constructs and state and federal common law, and concluding that there is little evidence that tribal courts are unfair to nonmembers); *id.* at 739 (noting tribal law "tends to mirror American laws" because tribes "must be able to function in the American political system in a seamless manner"); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

potential consequences of choosing to do business on tribal lands.

2. Even in the absence of congressional action, potential nonmember defendants are not without recourse. If a tribal court fails to accord due process to a nonmember defendant in any individual tort case, that failure will likely prevent the plaintiff from having the tribal court's judgment recognized and enforced in a state or federal court. See, *e.g.*, *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001) (holding that tribal court's judgment was not entitled to recognition because its proceedings violated due process); Resp. Br. 53-54. Moreover, nonmembers entering into consensual commercial relationships with tribes may negotiate appropriate choice-of-law or forum-selection clauses. See p. 2, *supra* (quoting provisions in Dolgencorp's lease); see also *Plains Commerce Bank*, 554 U.S. at 346 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that bank could have used "forum selection, choice-of-law, or arbitration clauses" to "avoid responding in tribal court or the application of tribal law"); *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 806-807, 815 (7th Cir.) (finding no need to exhaust jurisdictional question in tribal court where contract with tribe-owned corporation provided that it would be construed in light of state law and that venue would lie in state and federal courts), cert. denied, 510 U.S. 1019 (1993).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2015

AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORPORATION, *et al.*,

Petitioners,

—v.—

MISSISSIPPI BAND OF CHOCTAW INDIANS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MISSISSIPPI IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has participated in numerous cases before this Court, both as direct counsel and as *amicus curiae*. The ACLU of Mississippi is a statewide affiliate of the national ACLU.

SUMMARY OF ARGUMENT

The Court will determine in this case the extent to which Indian tribal courts may exercise civil jurisdiction over the activities of nonmembers on Indian trust land. In our view, the answer to that question lies in the concept of fair notice, for several mutually reinforcing reasons: It provides a unifying explanation of the Court's cases regarding tribal jurisdiction over nonmembers; it is familiar from other jurisdictional contexts; and it strikes an appropriate balance between tribal sovereignty and fairness to nonmembers.

The concept of fair notice is inherent in *Montana*'s consensual relationship exception as the Court has fashioned, discussed, and applied it. *Montana v. United States*, 450 U.S. 544 (1981). By

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[1] The parties have filed blanket letters of consent to the submission of *amicus curiae* briefs with the Clerk of the Court. No party has authored this brief in whole or in part. No one other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

contrast, Dollar General's assertion that it may not be subject to tribal court jurisdiction absent express consent represents a significant and unwarranted departure from existing law.

As both lower courts found, moreover, there is ample support in the record for the conclusion that Dollar General had fair notice that it might be subject to tribal jurisdiction on these facts. First, the activity in question occurred on tribal trust land, where the tribe's interests are at their highest and nonmembers have reason to be aware that tribal authority may apply. Second, Dollar General voluntarily selected this Indian reservation on which to engage in commercial transactions with tribal members. The Court has repeatedly recognized that nonmembers who make such a choice are presumed to know that such transactions subject them to tribal jurisdiction for suits arising out of their business activities. Third, Dollar General agreed to participate in the Youth Opportunity Program, a decision that led to the incident in question. Fourth, Dollar General signed an underlying lease with the Tribe in which it agreed to certain tribal adjudicatory authority, thus demonstrating that Dollar General is familiar with the Respondent Tribe's courts and was prepared to submit to them. Lastly, Dollar General is a sophisticated, multi-billion dollar corporation that surely could be expected to consider all its options before entering this reservation and agreeing to participate in the Youth Opportunity Program.

ARGUMENT

I. SETTLED PRINCIPLES OF LAW CONTROL THIS APPEAL.

This appeal presents the question whether a federally recognized Indian tribe may adjudicate a case in tribal court based on a claim that a nonmember sexually assaulted a tribal youth on tribal land. Two settled principles of law apply to this appeal: (1) Indian tribes retain certain sovereign powers, and (2) tribal powers over nonmembers are limited. As discussed below, Petitioners and their *amici* urge the Court to adopt a new rule that would deny *all* tribal court civil jurisdiction over *all* nonmember activity in the absence of express consent. Such a rule, however, represents a serious departure from the Court's current doctrine, one that would undermine the Court's support for tribal self-government and create striking inconsistencies with the conventional understanding of notice and fairness to defendants in other civil contexts.

A. Indian Tribes Retain Sovereign Powers.

Indian tribes "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)

(recognizing that "[t]he sovereignty retained by tribes includes 'the power of regulating their internal and social relations,' . . . [as well as the] power to exclude nonmembers entirely or to condition their presence on the reservation") (internal citation omitted); *Plains Commerce Bank v. Long Family Cattle Co., Inc.*, 554 U.S. 316, 327-28 (2008) ("As part of their residual sovereignty, tribes . . . may also exclude nonmembers from entering tribal land.").

The federal government has supported the independence and growth of tribal governments for decades. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.") This federal policy includes a recognition of tribal courts' importance. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development."). Reflecting this national commitment, Congress has restored the inherent authority of Indian tribes to exercise criminal jurisdiction over nonmember Indians, *see* 25 U.S.C. § 1301(2), *United States v. Lara*, 541 U.S. 193 (2004), and to exercise certain powers of criminal jurisdiction over nonmembers who commit particular crimes of domestic violence against a member of the tribe. *See* 25 U.S.C. § 1304.

B. This Court Has Limited Tribes' Civil Authority Over Nonmembers.

In *Montana v. United States*, 450 U.S. 544, the Court held that an Indian tribe may regulate the activity of a nonmember on nonmember fee land in

only two situations: (1) the nonmember has entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) the nonmember is engaging in an activity that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, 450 U.S. at 565-66. The Court has since held that *Montana* applies equally to questions concerning a tribal court's jurisdiction over claims arising on nonmember land. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (2007).

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court cited *Montana* for the proposition that tribes may lack civil jurisdiction over nonmembers even on tribal trust land in certain circumstances. *Id.*, 533 U.S. at 360. *Hicks*, however, did not alter the overarching principle recognized in *Montana* and confirmed in later cases that when nonmembers engage in activities on tribal trust land, there is a presumption of tribal jurisdiction. *Strate*, 520 U.S. at 453 (reiterating the "unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'") (quoting *Iowa Mut.*, 480 U.S. at 18). *See Hicks*, 533 U.S., at 386 (Ginsberg, J. concurring) (noting that *Hicks* did not involve activity occurring on tribal trust land but, rather, on off-reservation land).

A strong argument can be made, *see* Gov't Cert. Br. at 11, that an exercise of tribal authority over an activity occurring on tribal trust land need not be analyzed under the *Montana* exceptions.

Petitioners, however, assume that the *Montana* exceptions do govern such activities, and Respondents contend that the Court need not reach the question of whether jurisdiction is broader than the exceptions on tribal land because the first exception is clearly satisfied here. We will proceed in the same way. The *Montana* framework, though, recognizes that where the regulated activity is occurring on tribal trust land, tribal authority is presumptive.[2]

Respondents have also relied exclusively on the first "*Montana* exception." Again, we will do likewise, although we believe that sexual molestation of Indian youth by nonmembers significantly impacts tribal health and welfare.

II. THE *MONTANA* FRAMEWORK, INCLUDING THE CONSENSUAL RELATIONSHIPS EXCEPTION, EMBODIES A STANDARD OF FAIR NOTICE.

Both parties agree that the issue in this appeal—that is, whether tribal courts may adjudicate a tort claim filed by tribal members against a nonmember corporation doing business on tribal land—may be resolved consistent with *Montana*'s "consensual relationships" exception. The parties disagree, however, on that exception's application.

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[2] In most situations, as illustrated in this case, a nonmember engaging in continuous activity on tribal trust land would first have entered into an agreement with the tribe, either oral or written, obtaining the tribe's permission. That agreement would itself be strong evidence of a consensual relationship under *Montana*.

Dollar General has argued that a party must expressly consent to tribal jurisdiction. *See* Pet. Br. at 16 (claiming that tribal courts "lack civil jurisdiction over nonmembers absent congressional authorization (*e.g.*, in a statute or treaty) or the defendant's unambiguous consent (*e.g.*, in a forum selection clause of a contract)."). If accepted, Dollar General's interpretation would render superfluous most of the Court's language in the "consensual relationships" exception. Had the Court intended this exception to mean nothing more than express consent, the Court could easily have said so. Instead, the Court stated, *inter alia*, that "other arrangements" can satisfy this exception, rendering impossible Dollar General's interpretation that only one arrangement—express consent—was intended.

The only construction consistent with the Court's treatment of the consensual relationships exception is to view it as incorporating a standard of fair notice. Under that standard, if nonmembers should reasonably expect that their actions may subject them either to tribal regulation or judicial jurisdiction, then tribes retain regulatory or adjudicative power. On the other hand, if nonmembers could not reasonably predict that their actions would subject them to tribal authority, tribal jurisdiction is lacking.

The fair notice standard is a real-world test that takes into account the reasonable expectations of both the individual and the government. Surely, for instance, an American citizen who travels to France and sexually assaults a French child would know that he/she could be held accountable in a

French court applying French law. Written consent would not be a prerequisite.

Fair notice has been an omnipresent and unifying concern in all of this Court's cases involving tribal jurisdiction over nonmembers. Underlying each case is a consideration of whether the circumstances gave fair notice to the nonmember. *Montana*, for instance, concerned the tribes' ability to enforce a sweeping regulation barring nonmembers from hunting and fishing on land throughout the tribe's reservation, including on lands owned by the state or by nonmembers in fee simple. The land owned by nonmembers had passed into fee status pursuant to the General Allotment Act of 1887, a statute that broke up the tribal land base and opened reservations to non-Indian settlement. Given that the overarching goal of allotment (since thoroughly repudiated) was to eliminate tribal identity, the Court reasoned that nonmembers who acquired fee land pursuant to the allotment statute would have had little reason to expect that their actions on those lands would be subject to tribal regulation. *Montana*, 450 U.S. at 559 n.9.

Strate addressed the question whether a tribal court could exercise jurisdiction over a tort claim involving two non-Indians whose vehicles collided on a state highway running through the Three Affiliated Tribes of the Fort Berthold Reservation. The Court had to make a threshold determination whether the highway, maintained and controlled by the state pursuant to a right-of-way but located on tribal trust land, would be considered for purposes of the *Montana* test as "trust" land or "alienated" land. The Court held that the highway was more akin to

alienated land because the Tribes "retained no gatekeeping right" and "cannot assert a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456. Implicit in the Court's holding that tribal courts lacked jurisdiction is the fact that the defendant would not reasonably have had fair notice that the activity in question (an accident with another non-Indian on a state right-of-way) could be heard "in an unfamiliar [tribal] court" rather than state court. *Id.* at 459.

In *Nevada v. Hicks*, the Court held that a tribal court could not adjudicate a suit for damages filed by a tribal member against state game wardens who were "executing [state] process related to the violation, off reservation, of state laws," *Hicks*, 533 U.S. at 364, when they searched the plaintiff's reservation home. The Court found that that the plaintiff could not show that the wardens had entered into a consensual relationship with the tribe. *See id.* at 359 n.3. Rather, it found the "official actions at issue" in executing a warrant to be "far removed" from the sort of "private consensual relationship" encompassed by the exception. *Id.* (quotation marks omitted). The Court's clear and overwhelming concern in *Hicks* was that state law enforcement officers executing a state warrant in the course of investigating an off-reservation crime cannot be expected to know that their actions might subject them to tribal jurisdiction for alleged civil rights violations. *See id.* at 364-66 (emphasizing absence of prior authority limiting state jurisdiction over off-reservation crimes), *id.* at 386 (Ginsburg, J., concurring) (stressing that *Hicks*'s holding was limited to state officers performing official duties), and *id.* at 396 (O'Connor, J., concurring) ("Certainly,

state officials should be protected from civil liability for actions undertaken within the scope of their duties.").[3] In *Hicks*, the wardens were carrying out their official duties under state law to investigate a crime over which the state had undisputed jurisdiction. Under such circumstances, they did not receive fair notice that they might be sued in tribal court.

On the other hand, where the facts suggest that a nonmember had adequate notice, the Court has consistently upheld tribal jurisdiction. A finding of fair notice is implicit in *Williams v. Lee*, 358 U.S. 217 (1959). In that case, the Court held that a non-Indian business that had selected an Indian reservation in which to conduct its operations and engaged in direct sales to tribe members was subject to *exclusive* tribal adjudicatory jurisdiction to resolve a contractual dispute with a tribal customer. *See id.* at 223 (finding it "immaterial that the [business owner] is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

Similarly, a non-Indian business in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), was found subject to a tribe's regulatory authority because the corporation had chosen an Indian reservation in which to operate its business, entered into a contract with the tribe, and conducted its venture on tribal land, factors that raised a predictable expectation (for both the tribe and the

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[3] Justice O'Connor noted, however, that state officials should not necessarily be immune from tribal jurisdiction if exceeding the scope of their authority. *See id.*

business) that the corporation would be subject to tribal jurisdiction.

Finally, *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989), while resting on the tribe's regulatory authority under the second *Montana* exception, again illustrates the Court's preoccupation with fair notice in delineating the boundaries of tribal authority. In *Brendale*, the Court upheld the tribe's authority to apply its zoning laws to nonmember fee land within a "closed area" consisting predominantly of forested tribal land, but not to an "open area" where land was predominantly owned in fee by nonmembers. *Id.* at 438 (opinion of Stevens, J., announcing the judgment of the Court in part and concurring in part). The tribe severely restricted nonmember access to the closed portion, and the land retained its "essential" and "pristine" wilderness character. *Id.* at 440-41. By contrast, access to the open part was unrestricted, and the tribe had never attempted to regulate land use in the area. *Id.* at 445. *Brendale*'s fractured result can best be understood as reflecting a concern with notice: A purchaser of fee land in a heavily regulated area of distinctively tribal character surely has reason to expect that his or her land use may be restricted, while the same is not true in a mostly non-Indian area with no history of tribal regulation.

The Court's reliance on fair notice as a factor is further apparent in its focus on whether the activity that the tribe seeks to regulate occurred on trust land or alienated land. Although land ownership is "only one factor to consider" in determining the propriety of tribal jurisdiction, *see Hicks*, 533 U.S. at 360, land status has significant

import and "may sometimes be a dispositive factor." *Id.* If the activity in question occurred on tribal land, this factor weighs heavily in favor of the tribe. Indian tribes "retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454. *See also Plains Commerce*, 554 U.S. at 327 ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe") (quoting *Nevada v. Hicks*, 533 U.S. at 392) (O'Connor, J. concurring in part and concurring in judgment); *South Dakota v. Bourland*, 508 U.S. 679, 689 & 689 n.9 (1993) (drawing a sharp contrast for tribal jurisdiction purposes between land the tribe had conveyed to non-Indians in an area "broadly opened to the public" and land that remained under "absolute and exclusive" tribal control); *Montana*, 450 U.S. at 557 (noting that tribes have significantly greater concerns when an activity is occurring on Indian land than non-Indian land). Tribal concerns are at their apex when tribal land is involved.

Nonmembers engaging in activities on tribal lands surely know that the tribe can exclude them from those lands. *See Plains Commerce*, 554 U.S. at 327-28; *Montana*, 450 U.S. at 554 (recognizing that an Indian tribe "implicitly [has] the power to exclude others from" tribal land, as any landowner). Given that tribes have the greater power to exclude, they therefore have the lesser power to regulate access to that land and impose conditions on conduct occurring there. *See Bourland*, 508 U.S. at 688-89; *Brendale*, 492 U.S. at 434-36. Tribes, like all governments, also have a strong interest in protecting the conditions of the land itself. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-38 (1983) (noting that an important and widely acknowledged aspect of tribal

sovereignty is the right to "exercise[] substantial control over the lands and resources of [the] reservation"; *Merrion*, 455 U.S. at 141 (recognizing tribes' legitimate interests in "territorial management").

A second factor that has had significant import in the cases where it is present is whether the party being subjected to tribal jurisdiction voluntarily entered the reservation to engage in economic activity. In *Montana*, 450 U.S. at 565-66, the Court cited four cases to illustrate previous circumstances under which the consensual relationship exception was satisfied. Tellingly, all involved economic activity: *Williams v. Lee* (upholding tribal court jurisdiction to resolve a dispute between a tribe member and a non-Indian storeowner doing business on the Navajo Reservation); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding a tribal permit tax on a non-Indian who had leased tribal land to graze cattle); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (holding that an Indian tribe, as "a fundamental attribute of sovereignty," could impose a sales tax on a non-Indian who purchased goods from a tribal vendor on the reservation); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (upholding a tribal permit tax on non-Indians who wished to conduct commerce on the reservation). This list of cases, the Court explained in *Strate*, "indicates the type of activities the Court [in *Montana*] had in mind" when it fashioned the consensual relationships exception. *Strate*, 520 U.S. at 457.

III. FAIR NOTICE IS A KEY FACTOR IN OTHER JURISDICTIONAL INQUIRIES.

The Court's concern with fair notice in tribal jurisdiction cases finds analogues outside the tribal context in situations involving the fairness of a sovereign's exercise of judicial power. In considering, for example, whether states may assert personal jurisdiction over a given defendant under the minimum contacts framework, the Court has focused on the degree to which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thereby invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).[4]

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the Court stressed the relationship between the minimum contacts standard and fair notice, explaining that when the defendant has engaged in purposeful availment of a given forum, it "has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or . . . severing its connection with the State." *Id.* at 297. The defendant's voluntary and deliberate affiliations with a state thus helps, in

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[4] The Court has suggested that the limitation on tribal adjudicative jurisdiction over nonmembers pertains not "merely ... [to] ... personal jurisdiction" but also to subject matter jurisdiction. *See Hicks*, 533 U.S. at 367. The minimum contacts standard is nonetheless relevant to the tribal context because it reflects "traditional notions of fair play and substantial justice," values that *Montana*'s consensual relationships exception also incorporates. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

cases where such connections are present, to ensure the "reasonable foreseeability" of suit and to render it "presumptively not unreasonable to require [the defendant] to submit to the burdens of litigation in that forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

In *Burger King*, for example, the Court found that a defendant who entered into a "relationship that envisioned continuing and wide-reaching contacts with [the defendant] in Florida," could properly "be called to account there" for foreseeable harm that his actions had caused to the defendant. *Id.* at 480. Likewise, concurring in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2793 (2011), Justice Breyer suggested that a state might appropriately exercise personal jurisdiction over a "large manufacturer which specifically seeks" sales there, but not over a "small manufacturer [such as] an Appalachian potter" that sells a coffee mug that is later resold to a buyer from the forum state. This analysis reflects fair notice considerations: A defendant who deliberately "reach[es] out beyond" its home state to seek valuable opportunities elsewhere, *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 647 (1950), has had the chance to weigh the benefits of such opportunities against the potential burden of litigation in a foreign state.

To be sure, the usual minimum contacts framework does not precisely fit the tribal context because, as a result of the unique nature of tribal sovereignty, tribes and states exercise territorial jurisdiction in different ways and to different extents. *See Montana*, 450 U.S. at 563-64; *Plains Commerce*, 554 U.S. at 327-28. The *Montana* approach reflects

these differences, requiring a higher standard of affiliation with a tribe through the consensual relationships exception than is necessary in the personal jurisdiction context. Yet despite the greater stringency of *Montana*'s standard, *Montana*'s central concerns—fairness to defendants and recognition of sovereign interests—are the same: Can the defendant predict that its actions will subject it to jurisdiction and therefore shape its conduct so as to anticipate, or avoid, jurisdiction? Has the defendant benefitted from the laws and protections of the sovereign? Can the sovereign adequately protect its interests?

A "consensual relationship" test that incorporates fair notice principles addresses these concerns. Such a standard provides defendants who have only "random, fortuitous, or attenuated contacts" with tribes with reasonable assurance that they will not be subject to tribal jurisdiction. *See Burger King*, 471 U.S. at 475 (internal citations and quotation marks omitted). At the same time, it ensures, at the very least, that defendants who deliberately seek out profitable business dealings with tribes on tribal lands are on notice that the tribe presumptively retains its "gatekeeping" authority, both regulatory and adjudicative.

This Court has applied similar logic in the factors it considers in deciding whether to enforce judgments entered by foreign courts against U.S. defendants. These decisions are particularly analogous to the tribal context because state and federal courts may recognize such judgments even where they were obtained in the absence of the

constitutional protections available in U.S. courts.[5] For example, in *Hilton v. Guyot*, 159 U.S. 113 (1895), this Court, in considering whether a French judgment against U.S. defendants was entitled to recognition, rejected the defendants' objections to the rendering court's jurisdiction because the defendants were not merely "traveling through or casually found in a foreign country," but had instead established purposeful long-term contacts there. *Id.* at 204. Although the defendants were citizens and residents of New York, had their principal place of business in New York, and made no sales in France, they nonetheless "had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there." *Id.*[6] *Hilton*, a foundational enforcement case decided decades before the Court established the minimum contacts framework for personal jurisdiction, reflects the more fundamental intuition that, when a defendant has established ongoing commercial relationships in a foreign jurisdiction, it can reasonably anticipate the possibility of litigation in that country's courts.

Hilton's approach to jurisdiction continues to hold sway in the analysis that U.S. state and federal courts conduct in determining the enforceability of a

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[5] Indeed, because the majority of constitutional protections are statutorily made applicable to tribes through the Indian Civil Rights Act, tribal courts are likely to be *more* similar to state and federal courts in this regard than are the courts of countries with entirely distinct judicial systems.

[6] The Court ultimately concluded that the judgment in *Hilton* was not entitled to conclusive effect, but solely on the grounds that France did not afford reciprocal recognition to U.S. judgments.

foreign judgment. Whether applying federal common law of recognition or similar state recognition acts, most courts have evaluated the foreign court's jurisdiction over the defendant based on whether it conforms to the U.S. constitutional minimum contacts standard. *See Evans Cabinet Corp. v. Kitchen Intern. Inc.*, 593 F.3d 135, 142 n.10 (1st Cir. 2010) (collecting cases). Such analysis necessarily takes account of that standard's concern with fair notice.[7]

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[7] Courts' concern with fair notice in enforcement is also important because tribal judgments must often be enforced by state courts, providing an additional chance for judicial consideration of whether notice and other jurisdictional requisites were present. All states grant at least comity to tribal court judgments. Felix Cohen's Handbook of Federal Indian Law at § 7.07[2][b], 664 (2012 ed.). New Mexico, Idaho, Iowa and Michigan go further, recognizing tribal court judgments as a matter of full faith and credit. *See Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982); Iowa Code ch. 626D; Mich. Ct. R. 2.615. Under either a comity or full faith and credit standard, the state courts enforce tribal court judgments only after ensuring that the decisions comport with due process and that jurisdiction was proper. *See, e.g.*, Cal. Civ. Proc. Code § 1737(b) (providing for enforcement of tribal court money judgments unless the court finds that the tribal court lacked jurisdiction or did not provide due process); Wash. Super. Ct. Civ. R. 82.5 (similar).

IV. BECAUSE DOLLAR GENERAL HAD FAIR NOTICE THAT ITS ACTIVITIES MIGHT SUBJECT IT TO TRIBAL JURISDICTION, THE CONSENSUAL RELATIONSHIP EXCEPTION IS SATISFIED.

Every factor employed by the Court in its consensual relationship analysis weighs in favor of the Mississippi Band of Choctaw Indians. The facts show that Dollar General had fair notice, a principle that underlies the first *Montana* exception.

First, the activity-in-suit occurred on tribal land, where tribal interests are at their apex. *See Strate*, 520 U.S. at 454 ("We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land.") (footnote omitted).

Second, Dollar General voluntarily entered the reservation to conduct business there and to make a profit on sales of goods to members of the tribe. This is a classic "consensual relationship" scenario. *See Montana*, 450 U.S. at 565-66. Indeed, this Court, without exception, has repeatedly upheld tribal jurisdiction over a nonmember business engaging in commerce with tribal members on Indian land. In some circumstances, it has made tribal courts the exclusive forum for adjudication of such cases. *See Williams*, 358 U.S. at 222-23.

Third, Dollar General voluntarily agreed to participate in the Youth Opportunity Program, the activity that gave rise to the tort claim.

Fourth, Dollar General entered into a lease agreement with and obtained a business license from

the Respondent Tribe in which the corporation agreed to be subject to tribal court jurisdiction with regard to certain claims arising from the lease. Dollar General can hardly say that appearing in tribal court would force them into an unfamiliar tribunal.[8]

Lastly, Dollar General is a sophisticated, multi-billion dollar corporation whose attorneys surely researched the law prior to signing a lease with the tribe. Dollar General knew or should have known from the four economic-activity cases cited in *Montana* and from *Merrion v. Jicarilla Apache Tribe* that it would likely be held accountable for an employee's tortious conduct on tribal land that injured a member of the tribe. In negotiating its lease with the tribe, Dollar General could have requested an exemption from tribal civil jurisdiction in whole or in part. Instead, it signed a lease explicitly consenting to tribal court jurisdiction and the application of tribal law, and later agreed to participate in the tribe's Youth program. In neither case did it seek any immunity from tribal civil authority.

Given the language of the consensual relationship test, the cases cited in *Montana*

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[8] For reasons just explained, Dollar General had fair notice that it would be subject to the Tribe's civil authority in this context. Had there not been an underlying lease, fair notice would still be evident. However, the existence of this lease provision is significant because it demonstrates, at a minimum, that Dollar General is familiar with the tribal court forum. The degree of a defendant's familiarity with the tribal court has been referenced in this Court's jurisdictional decisions, *see, e.g., Strate*, 520 U.S. at 459.

illustrating its intended scope, and the Court's subsequent cases, all of which were known to Dollar General, there is ample support here for the conclusion reached by the Fifth Circuit: "Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment." *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174 (5th Cir. 2014).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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Dated: October 21, 2015

AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY, JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE, SR. AND JANE DOE,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads (AAR) is a non-profit national trade association whose members include America's major railroads. AAR appears as amicus curiae because its members have a vital interest in ensuring that their property interests and activities within Indian reservations and across tribal lands are subject to clear and predictable rules governing tribal civil adjudicatory jurisdiction over nonmembers. AAR represents member railroads before courts, agencies, and the United States Congress on matters of common concern to its members, and has filed previous briefs amicus curiae before this Court.[2]

AAR's members include intercity passenger, commuter, and freight railroads. The freight railroad members operate 85 percent of the line-haul mileage, employ approximately 95 percent of the workers, and account for approximately 97 percent of the freight revenues of all railroads in the United States. In addition, some AAR member railroads operate on

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than amicus curiae or its members has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have filed blanket consents to the filing of amicus curiae briefs in this case.

[2] *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9 (2007); *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158 (2007); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000).

longstanding rights-of-way that cross Indian reservations or tribal lands, and some lines also traverse areas located off reservations or tribal lands, but within areas over which tribal nations or groups may assert civil jurisdiction. For example, one AAR member railroad operates on rail lines crossing lands under the asserted jurisdiction of 25 different tribal nations, and another crosses lands under the asserted jurisdiction of 86 tribal nations.

AAR appears here recognizing its members' important and beneficial working relationships with many tribes. There are 566 federally recognized tribal nations in the United States,[3] and their legal and court systems vary widely. Some are highly structured, like the Navajo Nation, which has a multi-volume statutory code and a well-defined system of trial and appellate courts. Others are poorly financed and lack experienced personnel or identifiable law, with inadequate review in tribal appellate courts. For all tribal courts, there is simply no effective federal review of merits and civil rights issues. It is critical to AAR members—and, indeed, to all businesses in, or considering doing business in, areas potentially subject to tribal jurisdiction—to be able to determine efficiently which sovereign's courts have jurisdiction over their activities and the law that will be applied. The decision below, by concluding that agreements that do not provide clear and unequivocal consent supported tribal civil adjudicatory jurisdiction over a nonmember in an action seeking compensatory and punitive damages, injects further uncertainty into an already difficult jurisdictional calculus.

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[3] *See* 80 Fed. Reg. 1942 (Jan. 14, 2015).

Railroads have a particular need to voice their concerns about the decisions below. Retailers and other businesses generally have the freedom to choose whether to do business with tribes and their members. But railroads do not. Many railroads operate on rights-of-way through tribal lands, many of which are over a century old, and which cannot be abandoned without federal approval. In such circumstances, railroads' federal common carrier responsibilities essentially require them to interact with tribal nations to effectively operate their rail lines and to perform maintenance and other federally mandated activities. *See, e.g.*, 49 C.F.R. §§ 213.233-237. Accordingly, the situs of some railroads may leave little choice but to have a variety of agreements with tribal nations, tribal entities, and tribal members, ranging from easements or rights-of-way authorized under federal statutes, to maintenance, supply, or personnel-related agreements.

While the safest mode of surface transportation, rail operations, like all heavy industry, entail risk of injuries that may give rise to tort claims against rail operators. Congress has unambiguously insulated interstate railroads from certain state law based tort claims, but it has not directly addressed whether those protections apply to tribal law or in tribal courts. For these and other reasons, uncertainty as to whether tribal courts may have jurisdiction, or what laws and procedures may apply, is a persistent problem for AAR's member railroads. America's railroads highlight the need for brighter lines delineating the bounds of tribal court jurisdiction and the level of consent required to support tribal court jurisdiction.

While this Court's previous decisions define the scope of tribal jurisdiction in reasonable ways, lower court decisions, like that under review here, engender troubling uncertainty regarding the proper scope of tribal civil adjudicatory jurisdiction over nonmembers under *Montana v. United States*, 450 U.S. 544 (1981). Simply to determine the proper forum for tort and other litigation frequently requires extended, multi-forum litigation. Jurisdictional uncertainty discourages business investment and economic development in reservation and non-reservation areas over which tribal nations may assert jurisdiction.[4] While this case concerns a tort action, tribal court jurisdiction in regulatory and contract cases, and the risk of potentially devastating injunctive relief, present comparable threats to nonmember business. Uncertainty about the geographic scope of tribal jurisdiction further counsels for clear guidelines regarding the nature of consent required to support tribal civil adjudicatory power over nonmembers. A single rule governing the conditions necessary to invoke tribal court jurisdiction over nonmembers in all civil cases would allow nonmembers, members, and tribal nations to fashion their conduct to support fairer and more predictable dispute resolution.

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[4] Federal law defines "Indian country" for certain criminal jurisdictional purposes as "all land within the limits of any Indian reservation," including private lands and rights-of-way within those limits, "dependent Indian communities," and "all Indian allotments." 18 U.S.C. § 1151. The Court has declined to give this definition civil jurisdictional effect because "Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001). Tribes may assert adjudicatory jurisdiction over broader categories of lands than those included in Section 1151.

SUMMARY OF ARGUMENT

The Court's Indian law jurisprudence establishes that tribal nations and tribal courts lack jurisdiction over nonmembers unless one of two limited exceptions applies. *See Montana v. United States*, 450 U.S. 544, 564-66 (1981). As the decision below evidences, lower courts persistently misapply this Court's opinions determining the appropriate forum for resolution of civil litigation, improperly expanding *Montana*'s consensual relationship exception to permit tribal court jurisdiction whenever a "consensual relationship" bears some "nexus" with the asserted jurisdiction. They frequently fail to require any indication of clearly expressed consent to such jurisdiction over the controversy at hand. This case affords the Court an opportunity to clarify the proper scope of tribal civil adjudicatory jurisdiction over nonmembers. A rule that clarifies and simplifies determining whether such jurisdiction exists will allow courts, nonmembers, and tribes and their members to predict confidently where disputes may be resolved.

AAR urges a rule that clear and unequivocal consent is required to demonstrate nonmember consent to tribal civil adjudicatory jurisdiction, not just over tort actions but in all civil actions against nonmembers. Absent such a showing, tribal courts should lack civil jurisdiction over nonmembers under *Montana*'s first exception. Such a rule is well-grounded in this Court's jurisprudence and would limit the risk of prejudice to nonmember litigants that may arise from unexpected and unconsented-to litigation in tribal courts. Clear consent is essential because the great variations in tribal courts and legal systems and the absence of federal review of federal questions arising from tribal

court merits determinations, including from deprivations of federally protected civil rights, contradict fundamental precepts and jurisdictional allocations underlying dispute resolution in the federal system. The rule AAR proposes also will allow America's railroads and other businesses whose activities are charged with a federal purpose supporting a preemption of certain claims in federal or state court to prevent litigation in tribal court that may contravene Congress' intent to maintain uniform regulatory standards over litigation arising from their operations.

ARGUMENT

Dispute resolution in Indian country currently is fraught with uncertainty, leaving tribal nations, tribal members, nonmembers, the business community, and the lower courts without sufficient guidance or bright line rules to predict and determine efficiently tribal civil adjudicatory jurisdiction over nonmembers. The decision below, ruling that tribal court jurisdiction applies whenever a nonmember has any "consensual relationship" with a tribe or its members that is related to the tribal court action, improperly seeks to impose tribal court jurisdiction on a nonmember without regard to whether the nonmember has expressly consented to the court and law. This case affords the opportunity to clarify the nature of the consent required to support tribal civil adjudicatory jurisdiction under *Montana*'s first exception over claims against nonmembers.[5]

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[5] The Court has held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), but it has not answered the question of whether tribal adjudicatory jurisdiction is equal to tribal legislative, or regulatory, jurisdiction over nonmembers.

The Court's Indian law jurisprudence underscores an important limitation on the scope of tribal nation and tribal court jurisdiction: Tribal nations presumptively lack authority over nonmembers, while retaining inherent jurisdiction sufficient to govern their internal affairs. In case-by-case fashion, the Court has addressed specific circumstances where tribal court jurisdiction is inappropriate. *See* Part I.A, *infra*. This Court's present review affords the vehicle to address remaining uncertainty and prevent abuse by announcing a rule that tribal nations lack civil adjudicatory jurisdiction over claims against nonmembers absent clear and unequivocal consent. *See* Part I.B, *infra*.

This Court's guidance makes clear that the courts below, as well as other federal, state, and tribal courts, have inconsistently, and often incorrectly, applied this Court's jurisprudence in concluding that a tribal court had jurisdiction over a nonmember. *See* Part I.C, *infra*. This departure from the Court's guidance is unsettling, given that tort actions, like the one giving rise to this matter, exemplify the challenges arising from the exercise of tribal civil adjudicatory jurisdiction. Tort actions engender substantial risk for unconsenting nonmembers, in contexts where critical procedural and substantive safeguards present in the federal and state court system do not exist. *See* Part II, *infra*. The necessity of having a clear and predictable rule is especially important to interstate businesses that must serve in many locales or to which Congress has provided defenses to state court litigation, such as federally regulated railroads and

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See Nevada v. Hicks, 533 U.S. 353, 358 (2001). It is not necessary to answer that question in this case, as the proposed rule will provide a clear guide regardless of whether the two types of jurisdiction are equal in breadth.

similarly situated businesses, as discussed in Part III, *infra*.

I. THE COURT'S JURISPRUDENCE ESTABLISHES THAT TRIBAL COURTS LACK JURISDICTION OVER NONMEMBERS ABSENT THEIR CLEAR AND UNEQUIVOCAL CONSENT.

This Court, in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, has enumerated several principles that confirm the Fifth Circuit erred in ruling that the "nexus between the *alleged* misconduct and the consensual action of Dolgencorp in participating in the YOP [youth opportunity program]" supplied the consent necessary to establish a consensual relationship under *Montana*. Pet. App. 14-15. This Court's groundbreaking decision in *Montana*, and its cases applying the "*Montana* rule," rest on a common foundation: "[E]fforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). It is the tribal court plaintiff's burden to demonstrate that an exception to the *Montana* rule applies. *Plains Commerce Bank*, 554 U.S. at 330. *Montana*'s two "exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks and citations omitted).

However, despite the Court's several fact-based formulations, many lower courts still fail to discern the Court's guidance on the fundamental question, what conduct or agreement suffices to form the required "commensurate consent," *id.* at 337, to tribal court

jurisdiction. The Court should address that question here and declare that nonmembers must give clear and unequivocal consent to the jurisdiction asserted.

A. The Court's Development and Application of the *Montana* Rule Supports a More Definite Rule Governing Tribal Civil Adjudicatory Jurisdiction Over Nonmembers.

From the earliest days, this Court has confirmed that tribal nations' powers are grounded in internal self-government. *Johnson v. M'Intosh* reasoned that members of the broader society have "perfect independence" from tribal nations. 21 U.S. (8 Wheat.) 543, 572 (1823). In *Worcester v. Georgia*, this Court observed the limited nature of tribal power:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the *internal affairs of the Indians* . . . . The king . . . *never intruded into the interior of their affairs, or interfered with their self-government,* so far as respected themselves only.

31 U.S. (6 Pet.) 515, 517 (1832) (emphasis added). From this historical foundation, when recognizing tribal inherent sovereignty, this Court has embraced the bedrock principle that tribal nations have the "right of internal self-government" and "*the right to prescribe laws applicable to tribe members* and to enforce *those* laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis added and citations omitted); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (tribes "have power to make their own substantive law *in*

internal matters and to enforce that law in their own forums") (emphasis added and citations omitted).[6]

In *Montana*, this Court built upon its jurisprudence addressing when a tribal nation's powers extend beyond its members to reach nonmembers. The Court's conception of the limited nature of tribal authority formed a major predicate underlying the *Montana* decision. *Montana*, 450 U.S. at 564-65 (noting that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), relied on "principles [that] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," foreclosing tribal criminal jurisdiction over nonmembers).

Montana established an outer boundary of tribal civil authority over nonmembers on nonmember-owned fee lands within reservations, holding that tribal nations lack inherent authority over nonmembers, unless the tribal nation can demonstrate that one of two exceptions is met. 450 U.S. at 564-66. Under the first exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565-66 (citation omitted). Under the second exception (not at issue here), "[a] tribe may also retain inherent

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[6] In *Johnson v. M'Intosh*, Chief Justice Marshall explained the effect of European "discovery" and the relationship between the European nations and tribes: "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [t]heir rights to complete sovereignty, as independent nations, were necessarily diminished . . . ." 21 U.S. (8 Wheat.) at 574.

power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Unless a *Montana* exception applies, sovereign authority over nonmembers "cannot survive without express congressional delegation." *Id.* at 564.

In decisions applying *Montana* to tribal courts' civil adjudicatory jurisdiction over nonmembers, the Court has labored case-by-case to clarify the narrow scope of jurisdiction under the *Montana* exceptions and to simplify the standard by which courts may determine the scope of that jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997), this Court's first interpretation of the "consensual relationship" required by *Montana*'s first exception, the Court extended *Montana* to a right-of-way across tribal trust lands. The Court found "no 'consensual relationship' *of the qualifying kind*," *Strate*, 520 U.S. at 457-58 (emphasis added), in a subcontract agreement between A-1 and the Tribes for work to be performed on the reservation, because the injured plaintiff was a "stranger" to A-1's subcontract with the Tribes. Hence, "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them. The *Montana* rule, therefore, and not its exceptions, applies to this case." *Strate*, 520 U.S. at 459 (internal quotation marks and citation omitted). Since the injured plaintiff might pursue her claim in state court, "*[o]pening the Tribal Court for her optional use* is not necessary to protect tribal self-government . . . ." *Id.* (emphasis added).

This Court next addressed tribal court civil jurisdiction over nonmembers in *Nevada v. Hicks*, 533 U.S. 353 (2001). In holding that the Fallon-Paiute-Shoshone Tribal Court lacked subject matter jurisdiction over tort and civil rights claims against a state game warden who executed a warrant at the plaintiff's residence on tribal trust land, the Court extended the *Montana* rule to such lands. *Hicks* reinforced the bedrock principle that tribal jurisdiction over nonmembers "must be connected to that right of the Indians to make their own laws and be governed by them." 533 U.S. at 361. The Court found the execution by state officers of a search warrant pursuant to an authorizing agreement with the Tribe did not satisfy *Montana*'s first exception because the exception contemplated a "*private consensual* relationship," *Hicks*, 533 U.S. at 359 n.3, and "private individuals who *voluntarily submitted themselves* to tribal regulatory jurisdiction . . . .", *id.* at 372 (emphasis added). With respect to the plaintiff's civil rights claims, the Court recognized that "the tribe and tribe members are . . . able to invoke [federal or state courts] to vindicate constitutional or other federal- and state-law rights[,]" *id.* at 373, and the tribal court could not address federal civil rights claims because "[t]ribal courts, it should be clear, cannot be courts of general jurisdiction" over nonmembers, *id.* at 367. Stating that land status is only "a factor" in the *Montana* analysis, *Hicks*, 533 U.S.at 370, *Hicks* recognized that *Montana* and *Oliphant* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. at 360.

The Court returned to tribal court civil jurisdiction in *Plains Commerce Bank*, where the tribal court plaintiffs asserted contract and tort claims against the nonmember bank, located outside tribal lands, arising

from loan transactions regarding real property within the Cheyenne River Sioux Reservation. 554 U.S. at 320-21. The Court did not fully reach the broader question presented there, and here, regarding the scope of adjudicatory jurisdiction over nonmembers. However, though focusing on tribes' lack of legislative power over the sale of nonmembers' fee lands, the Court reinforced the necessity of nonmember consent given the profound differences between tribal court and state or federal adjudications: regulating the sale of fee land through adjudicatory jurisdiction lies "beyond the tribe's sovereign powers, [and] runs the *risk of subjecting nonmembers to tribal regulatory authority without commensurate consent*." *Id.* at 337 (emphasis added).

B. A Rule Requiring Clear and Unequivocal Consent to Tribal Civil Adjudicatory Jurisdiction over the Subject Matter of the Claim Should Be the Standard to Determine Whether *Montana*'s First Exception Is Satisfied.

AAR proposes the Court adopt a uniform and unambiguous rule for determining when a tribal court may exercise civil adjudicatory jurisdiction over a nonmember. The Court's cases addressing the scope of the *Montana* consent exception demonstrate that nonmembers should not be subject to tribal civil adjudicatory jurisdiction, whether on tribal nation lands or non-Indian fee land or its equivalent within or outside of a tribal nation's reservation, absent their clear and unequivocal consent to such jurisdiction and tribal law for the claim asserted.

AAR's proposed rule is consistent with this Court's rules regarding appropriate consent for a waiver

of presumptions governing dispute resolution. For example, as this Court has recognized, federal and state courts do not have jurisdiction over tribal nations absent the "clear" waiver by the tribal nation of its sovereign immunity or "unequivocal" abrogation of that immunity by Congress. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001); *accord Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, ___, 134 S. Ct. 2024, 2031 (2014). Similarly, the proponent of tribal court jurisdiction must demonstrate comparable consent by a nonmember before this Court's presumption against tribal court jurisdiction over that nonmember is rebutted.

The rule AAR proposes also is supported by the Court's decisions requiring consent to support a waiver of judicial remedies by contractually electing arbitration. Although Congress has "declared a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), "a party may not be compelled" to participate in arbitration because of the "foundational [Federal Arbitration Act] principle that arbitration is a matter of consent." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Given that tribal nations presumptively lack jurisdiction over nonmembers and tribal courts do not enjoy general jurisdiction, at least a similar level of consent should be required before a tribal court may exercise civil adjudicatory authority over nonmembers.

The Court's *Montana* line of cases requires the rule proposed here. *Strate* rejected the notion that tribal court civil adjudicatory jurisdiction over a nonmember could be founded on a subcontract agreement between A-1 and the Three Affiliated Tribes for work to be

performed on the reservation, where the injured plaintiff was not a party to the contract, and the Court found "no 'consensual relationship' of the qualifying kind." 520 U.S. at 457-58. In *Hicks*, the Court required a "*private consensual* relationship," 533 U.S at 359 n.3, reflecting the nonmember's "arrangements" with the tribal nation show the nonmember "voluntarily submitted" to tribal regulatory jurisdiction, *id.* at 372 (emphasis added).

Atkinson Trading Co. held that a nonmember trader and hotel operator was not required to collect and remit Navajo hotel occupancy tax by virtue of its acquiring a federal Indian trader license: "Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'" 532 U.S. at 657.[7] Most recently, *Plains Commerce Bank*, the Court reversed the Eighth Circuit's conclusion, an error repeated by the Fifth Circuit here, that a consensual relationship can be found based only on a "preexisting commercial relationship." *Id.* at 323 (internal quotation marks and citation omitted).

The Court's cases reflect *Montana*'s first exception is satisfied, not by a "relationship" alone, but by "commensurate consent."[8] Clear and unequivocal

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[7] The Court has formulated the *Montana* consent requirement with respect to taxation consistently, concluding "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading Co.*, 532 U.S. at 656 (citation omitted). That conclusion compels the requirement that nonmembers' consent be to the specific subject matter of the jurisdiction asserted.

[8] *Plains Commerce Bank*'s statement that a nonmember can consent to tribal jurisdiction "either expressly or by his actions," 554 U.S. at 337, does not conflict with the rule proposed here. The sentence following that quotation suggests tribal jurisdiction

consent to the tribal civil adjudicatory jurisdiction in issue should be required.

C. Experience Under the *Montana* Rule and Its Exceptions Counsels a More Definite Rule Governing Tribal Civil Adjudicatory Jurisdiction over Nonmembers.

The decision below reflects a pattern of lower court decisions finding *Montana*'s "consensual relationship" requirement satisfied despite the absence of clear consent to the tribal court jurisdiction asserted—or even finding tribal jurisdiction exists despite the nonmember's and its contracting parties' affirmatively rejecting tribal court jurisdiction in favor of off-reservation dispute resolution. Consequently, nonmembers cannot predict confidently whether they will be subject to tribal civil adjudicatory jurisdiction and, once there, what law will apply or what rights they will have. The proposed rule, consistent with the Court's longstanding Indian law jurisprudence requiring more than a mere consensual relationship, will end this uncertainty.

1. The Decision Below Exemplifies Lower Courts' Misunderstanding of the *Montana* Rule.

The Fifth Circuit departed from this Court's guidance, as have other lower courts, by finding the first *Montana* exception satisfied based upon its view of a "consensual relationship," ignoring the absence of clear consent. The Fifth Circuit majority thought that,

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could be supported by the tribe's inherent power to exclude. If the tribe communicates its conditions with sufficient clarity, a nonmember's actions arguably could reflect knowing and voluntary consent to those conditions.

under *Montana*'s first exception, "the tribe may only regulate activity having a logical nexus to *some consensual relationship* between a business and the tribe or its members." Pet. App. 17 (emphasis added). This conception led the Fifth Circuit to find the first *Montana* exception satisfied by a consensual relationship between the Tribe and Petitioner based only upon the "nexus between the *alleged* misconduct and the consensual action of Dolgencorp in participating in the YOP [youth opportunity program]." Pet. App. 14-15.[9] The majority identified no express agreement to Tribal Court or Tribal law; instead, it disclaims seeking specific consent: "entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts." Pet App. 22. In this regard, the Fifth Circuit ran afoul of this Court's teaching that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe *have a nexus to the consensual relationship itself*." *Atkinson Trading Co.*, 532 U.S. at 656 (emphasis added). Reflecting the incongruity of the courts' application of *Montana*, the courts below held the alleged perpetrator of the abuse not subject to tribal court jurisdiction, while his employer remains potentially liable, leaving difficult issues of proof and indemnity that unconsented-to tribal court jurisdiction engender.

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[9] The United States makes much of the language of the lease between Petitioner's affiliate and the Tribe. Brief for the United States as Amicus Curiae 2-3, 12 (May 12, 2015). Yet, the Fifth Circuit correctly did not rely on the lease for its conclusion that a consensual relationship existed. *See* Pet. App. 14 n.4. And for good reason—the lease referenced tribal court and tribal law only with respect to the lease "agreement and any related documents." Pet. App. 63; *see Atkinson Trading Co.*, 532 U.S. at 656.

All parties agree the scope of *Montana*'s second exception is not in issue here. Nonetheless, by focusing on the "safety of the child's workplace," and the "harm caused to the child," Pet. App. 13, 14, the Fifth Circuit improperly injected into its analysis the concerns motivated by *Montana*'s second exception, *i.e.*, nonmember conduct that significantly threatens "the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This Court has rejected such a broad reading of *Montana*'s second exception: "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 457-58. The Fifth Circuit's expansion of *Montana*'s first exception to incorporate aspects of the second "severely shrinks" the bedrock principle that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," *Plains Commerce Bank*, 554 U.S. at 328, by failing to require clear consent to the suit at hand as a prerequisite to tribal court jurisdiction.

2. Other Lower Courts Similarly Misapply *Montana*'s First Exception.

Other federal circuit courts have expanded the consensual relationship exception beyond reasonable limit. For example, in *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997), the Second Circuit failed to analyze whether the nonmember had expressed consent to dispute resolution in tribal court, focusing instead on a "relationship" with a tribe or tribal member. *Basil Cook* found that a nonmember company that engaged in a course of business dealings with a tribe had a consensual

relationship sufficient to subject it to tribal adjudicative jurisdiction, even though no tribal court existed at the time the agreements were formed. *Id.* at 64. The nonmember party to the contract did not contemplate, much less consent to, tribal civil adjudicatory jurisdiction, for the simple reason that the tribe had no tribal court when the relationship was formed, and no subsequent acts by the nonmember demonstrated consent. *Id.* at 63-64.

First Specialty Insurance Corp. v. Confederated Tribes of the Grande Ronde Community of Oregon, No. 07-05-KI, 2007 U.S. Dist. LEXIS 82591 (D. Or. Nov. 2, 2007), illustrates the "procedural nightmare" that can be caused by the lack of clear jurisdictional rules. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In *First Specialty*, the Tribes filed securities claims against their financial and investment advisor in state court, even though the relevant agreement required arbitration. 2007 U.S. Dist. LEXIS 82591, *3. The state court ruled all parties were subject to binding arbitration, and the arbitration panel dismissed the Tribes' claims, and awarded the investment company $1.4 million in attorneys' fees and costs, plus interest. *Id.* at *3-*4. The Tribes then succeeded in having a portion of that award set aside in tribal court. *Id.* at *4. When the advisor sought relief in federal court, the federal district court found the tribal court had jurisdiction under *Montana*'s first exception, because the very contract containing the arbitration agreement and the dealings under that agreement formed a "consensual relationship" with the Tribes. *Id.* at *9-*10; *see also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 401 F. Supp. 2d 952, 958 (N.D. Iowa 2005) (requiring exhaustion of tribal remedies, despite arbitration clause and agreement

that any dispute about arbitrability would be submitted first to a federal court). A rule requiring clear and unequivocal consent to establish tribal court jurisdiction under *Montana*'s first exception is required to prevent agreements not clearly contemplating tribal court jurisdiction, or even contemplating non-tribal court dispute resolution, from subjecting nonmembers to tribal courts.

3. Failure to Heed This Court's Decisions Regarding the Effect of Land Status Further Complicates Jurisdictional Determinations.

This Court's guidance is needed because lower federal courts, and some tribal courts, have improperly cabined *Montana*'s application to disputes arising from actions on fee land, or the equivalent of non-Indian fee land. Of concern to AAR members is the United States' injecting this misunderstanding into this proceeding, contending, apparently without reference to the *Montana* exceptions, that "*Montana*'s general rule limiting tribal regulatory authority does not apply to claims such as those at issue here, which are brought against private defendants and arise out of an ongoing business on tribal trust land pursuant to a lease and license from the Tribe." Brief for the United States as Amicus Curiae 11 (May 12, 2015). The United States' proposal would subject all nonmembers who happen to have longstanding leases and/or licenses to tribal court jurisdiction *without regard to the presence or absence of express consent to jurisdiction in such documents*. This standard is broader than *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802, 814, 819 (9th Cir. 2011), the case the United States cited in support, which appears to address only the power to exclude a nonmember

who had no arguable basis for continued presence on the reservation, a circumstance far afield from the present case. AAR's members, like many other businesses, have little choice but to operate on tribal nations' lands pursuant to appropriate, generally long-term, agreements. The suggestion that such a circumstance supports *per se* tribal court jurisdiction turns the Court's jurisprudence on its head.

In *EXC, Inc. v. Kayenta District Court*, 2010 Navajo Sup. LEXIS 4, *22 (Navajo Nation Sup. Ct. 2010), the Navajo Nation Supreme Court stated that "the *Montana* test is only relevant within the Navajo Nation on non-Indian owned fee land." The Navajo Supreme Court alternatively stated that, even if it assumed *Montana* applied, a consensual relationship was formed by the operator's repeatedly doing business on Navajo lands and was implied under a tour operator permitting regime. In the operator's federal court challenge to tribal court jurisdiction, the Ninth Circuit held that *Montana*'s first exception did not apply "because the unsigned permit agreement—even if binding on Appellees—did not provide sufficient notice that EXC would be subject to tribal court jurisdiction on U.S. Highway 160 to be a basis for imputing consent." *EXC, Inc. v. Jensen*, 588 Fed. App'x 720, 722 (9th Cir. 2014) (unpublished), *writ filed*, *Jensen v. EXC, Inc.*, Case No 15-64 (July 13, 2015) (response ordered and due October 9, 2015).

These positions directly contradict *Hicks* and *Plains Commerce Bank*.[10] *Hicks*, in reversing the Ninth

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[10] *Water Wheel* also conflicts with opinions of other circuit courts that have applied *Montana* without regard to land status. *See, e.g., Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) ("*Montana*'s analytic framework now sets the outer limits of

Circuit's ruling that *Montana* does not apply to actions arising on tribally owned lands, explained that "the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. at 360; *id.* at 387 (O'Connor, J., concurring) ("Today, the Court finally resolves that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."). The Court reaffirmed this principle in *Plains Commerce Bank*: "This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians . . . ." 554 U.S. at 328. Those decisions reflect the Court's gradual, considered determinations that the unique circumstances of tribal courts require application of the *Montana* exceptions as a prerequisite to tribal court jurisdiction without regard to land status

Nonmembers should not be subject to tort or other civil claims in tribal court simply because they are present, perhaps unpredictably or unpreventably, on tribal land when a dispute arises. The Court should reaffirm *Montana*'s presumption that tribal courts lack civil adjudicatory jurisdiction over nonmembers without regard to land ownership.[11] Requiring clear

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tribal civil jurisdiction-both regulatory and adjudicatory-over nonmember activities on tribal and nonmember land."); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069-70 (10th Cir. 2007) (stating *Hicks* "put to rest" any dispute about whether *Montana* applied to tribal land, and "the only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority").

[11] *Williams v. Lee*, 358 U.S. 217 (1959), does not change this analysis. *Montana* limits the exercise of jurisdiction by a tribal

and unequivocal consent to tribal court jurisdiction over the matter asserted appropriately balances tribal and nonmember interests regarding civil adjudicatory jurisdiction and will assist courts, and parties, in determining where disputes should be resolved without multi-court litigation to determine the proper forum.

II. THE STATUS OF TRIBAL NATIONS IN THE FEDERAL SYSTEM REINFORCES THE NEED FOR CLEAR AND UNEQUIVOCAL CONSENT TO TRIBAL CIVIL ADJUDICATORY JURISDICTION OVER NONMEMBERS.

The unique substantive and procedural backdrop against which tribal courts function within the federal system compels the conclusion that tribal nations should not have civil adjudicatory jurisdiction over nonmembers absent clear and unequivocal consent. Of the 566 federally recognized tribal nations in the United States, many have no publicly available law or identifiable courts, and some tribal court decisions are subject to review by the tribe's executive and legislative branches, even when the actions of those branches are at issue. Given this setting, Justice Kennedy's observation in *Duro v. Reina*, which held a tribal nation could not assert criminal jurisdiction over a nonmember Indian, applies with full force:

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court over a nonmember defendant. *Williams*, in contrast, considered whether a state court had jurisdiction over a tribal defendant. As the Tenth Circuit stated in *MacArthur*, the relevant inquiry under *Montana* is not *where* the action to be regulated occurred, but "the membership status of the individual or entity over which the tribe is asserting authority." 497 F.3d at 1069-70.

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms. It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

495 U.S. 676, 693 (1990) (internal quotation marks and citations omitted). Congress enacted criminal legislation regarding nonmember Indians, but not non-Indians, in response to *Duro*, and this Court considered the effect of that legislation, and deferred to it, in *United States v. Lara*, 541 U.S. 193, 205-07 (2004). Although many tribal nations are strengthening their tribal courts, the structural concerns Justice Kennedy identified, and others, still pervade Indian country court systems and threaten to prejudice nonmember litigants. These structural concerns are present at all phases of the litigation, including the composition of juries, the adequacy of procedure, and the magnitude of judgments. *See, e.g.*, *Simmonds v. Parks*, 329 P.3d 995, 1003 (Alaska 2014) (noting the Minto Tribal Court does not allow attorneys to speak to the court).

Clear and unequivocal consent for a nonmember to be subject to tribal civil adjudicatory jurisdiction should be required because it is impossible for a nonmember to evaluate risks of laws that often cannot be identified with reasonable certainty. Even tribal nations with substantial written and reported law and well-developed court systems, like the Navajo Nation, apply unwritten customary or traditional law. The Navajo Nation Supreme Court, despite the Nation's multi-volume tribal code, relied on unwritten Navajo traditional law, holding, contrary to a ruling of the Ninth Circuit Court of Appeals in *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1996), that a 40-year-old lease provision exempting a power plant from certain Navajo regulations is invalid and unenforceable as it relates to tribal employment regulation. *Thinn v. Navajo Generating Station, Salt River Project*, No. SC-CV-25-06, slip op. at 2, 6-10 (Navajo Nation Sup. Ct. Oct. 19, 2007). Nonmembers should be entitled to address the risk that unwritten tribal law, customs, traditions, and norms may factor prominently in civil actions litigated in tribal court.

Unpredictable changes in tribal laws or governments may affect the law and personnel of tribal courts. *See, e.g.*, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1199 (9th Cir. 2013) (while arbitration pursuant to a contract was proceeding, the tribal council changed the law to permit the tribe to seize by eminent domain the nonmember's contractual interest that it advanced in the arbitration); *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1148 (N.D. Cal. 2014) (two factions of a tribal government each set up a tribal court and issued contradictory orders to a nonmember); *Vacco v. Harrah's Operating Co., Inc.*, 661 F. Supp. 2d 186, 196-97 (N.D.N.Y. 2009) (enforcing

a settlement agreement signed six years prior, after a new tribal council extended a statute of limitations in order to enforce a previously-entered tribal court judgment against a nonmember).

Tribal civil adjudicatory jurisdiction over nonmembers presents particular forum-based concerns given risks that local passions may unfairly prejudice outsiders. *See, e.g.*, *Burlington N. R. R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997), *as amended* (Apr. 9, 1997) (majority opinion held the defendant had not exhausted tribal remedies, over dissent highlighting lack of due process protections for the nonmember defendant and "[s]erious questions cast[ing] a shadow over the tribal court judgment"), *judgment vacated sub nom. Burlington N. R. R. Co. v. Estate of Red Wolf*, 522 U.S. 801 (1997).[12] This concern is ameliorated in state courts by the federal courts' diversity jurisdiction and removal authority, *see* 28 U.S.C. § 1441, and this Court's ability to review state court decisions that conflict with federal law, *see* 28 U.S.C. § 1257. Those important limitations on "home court" advantage are inapplicable to the courts of tribal nations because the United States Constitution generally does not apply to tribal nations or tribal courts, and the Congressionally prescribed alternative remedy to ensure fundamental fairness, the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, is substantially unenforceable outside tribal courts, councils, or executives. The unique insulation of tribal courts from constitutional and statutory guarantees of fairness otherwise applicable to federal and state court litigants in the federal system, *see*

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[12] The $250 million tribal court verdict was reduced voluntarily by counsel for the tribal court plaintiffs, apparently out of concern over reactions to the verdict. *But see* Pet. Br. 9. The tribal court denied a motion to reduce or set aside the verdict.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 & nn.3-4 (1978), requires clear nonmember consent to tribal court jurisdiction.

The lower federal courts also lack jurisdiction to review tribal court actions that wrongly decide federal issues or violate federal rights. While a federal court has federal question jurisdiction to determine whether a tribal court has subject matter jurisdiction over a nonmember, *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985), the Court has not recognized lower federal court jurisdiction to examine any other issue decided by the tribal court.[13] While the ICRA imposes certain Constitution-like limitations on tribal governments, the lower federal courts have interpreted *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), to deprive federal courts of jurisdiction over injunctive, declaratory, or damage actions under the ICRA (beyond habeas corpus), or to rectify a deprivation of ICRA rights, even after exhaustion of tribal court procedures. *See, e.g.*, *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011-12 (10th Cir. 2007).

Perhaps contrary to this Court's intent in *Martinez*, "there remain a sizeable number of tribes that do not [waive ICRA immunity]. This means that the assertion of the sovereign immunity defense keeps many ICRA suits from ever being litigated in tribal court." Angela R. Riley, *Good (Native) Governance*, 107 Colum.

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[13] Lower courts are not encouraging on this point. *See, e.g.*, *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not re-adjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." (Citation omitted.)).

L. Rev. 1049, 1111 (2007); *see also* U.S. Comm'n on Civil Rights, *The Indian Civil Rights Act* 72 (1991). Recognizing that ICRA decisions are subject only to tribal review, some tribal courts have opined that ICRA duties are optional. *See, e.g.*, *In re Batala*, 4 Am. Tribal Law 462, 468 (Hopi App. Ct. 2003) ("[T]he Hopi Tribe is not bound by the provisions of the Indian Civil Rights Act."). Though Congress likely did not intend the ICRA to create unenforceable rights, the existing federal remedial vacuum counsels strongly for requiring clear and unequivocal consent before a nonmember may be compelled to defend in tribal court. The absence of review of federal questions arising from the merits determinations of tribal courts or juries contradicts fundamental precepts underlying American dispute resolution. *See* U.S. Const., Art. III, § 2 ("The judicial power [of the United States] shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties . . . .").

Contrary to claims of the United States' and Respondent's certiorari stage briefs, citing *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997), and *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001), a nonmember may not be able to effectively challenge tribal court errors and excesses in an action to enforce a tribal court judgment in federal or state court. *See* Brief of Respondents Mississippi Band of Choctaw Indians 30 (Aug. 21, 2014); Brief for the United States as Amicus Curiae 20 (May 12, 2015). First, even if a challenge to enforcement on due process grounds were arguably effective, it would entail the expense and prejudice of litigating fully through tribal courts before such a remedy may be available. Second, the remedy in those cases, for a nonmember defendant deprived of due process, provides little, if any, comfort to defendants who lost on

other grounds, including erroneous federal question rulings. Finally, when a tribal court judgment can be enforced through injunctive relief or levy against on-reservation personnel or assets, there remains no non-tribal remedy at all. A clear jurisdictional rule is necessary, not a remedy allowed in two decisions by a single court of appeals that is a poor substitute for reliable relief.

III. AMERICA'S RAILROADS REFLECT THE NEEDS OF INTERSTATE BUSINESS FOR A CLEAR RULE.

The lack of a clear jurisdictional rule, and the structurally-based uncertainties arising from the unique status of tribal nations, present particular difficulties for AAR's member railroads. Railroads do not enjoy the same freedom as other businesses to choose whether to do business with tribal nations and their members or on tribal lands. Many railroads operate on century-plus old federally granted rights-of-way or easements through tribal lands, which cannot be abandoned without federal approval. Through treaties, land grant and right-of-way granting statutes, and rail regulatory legislation, the United States has proclaimed broad federal policies reinforcing the necessity of interstate rail transportation and a nationally uniform regulatory structure insulating rail carriers from inconsistent local laws.

Even before the Civil War, the United States began ensuring that railways could pass through reservations by the various treaties that Congress entered into with tribes, which excepted the railroads from tribal authority. For instance, Article 10 of the Treaty of 1855 with the Confederated Tribes of the Umatilla Indian Reservation provides:

> The said confederated bands agree that, whenever in the opinion of the President of the United States the public interest may require it, that all roads highways and railroads shall have the right of way through the reservation herein designated or which may at any time hereafter be set apart as a reservation for said Indians.

12 Stat. 945 (June 9, 1855). In the 1868 Treaty with the Navajos, that tribal nation agreed not to "oppose" the construction of railways and for the United States to pay damages for injuries during construction:

> They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

15 Stat. 667, 669-70 (June 1, 1868).

Congress reinforced this federal policy of railway passage with a series of statutes granting rights-of-way to railroads between 1862 and 1899. *See, e.g.*, Act of July 1, 1862, ch. 120, §§ 1-20, 12 Stat. 489; Act of July 2, 1864, ch. 216, §§ 1-22, 13 Stat. 356; General Right-of-Way Act of 1875, 18 Stat. 482, *as amended*, 43 U.S.C. § 934; Act of March 2, 1899, ch. 374, § 1, 30 Stat. 990, *as amended*, 25 U.S.C. § 312 ("A right of way for a railway . . . through any Indian reservation in any

State or Territory . . . is hereby granted to any railroad company . . . .").

Congress' intent that railroads be subject to federal, not tribal, jurisdiction is evidenced by congressional actions. In 1887, less than ten years after the Navajo Treaty, Congress enacted the Interstate Commerce Act, 24 Stat. 379, 49 Cong. Ch. 104 (Feb. 4, 1887), and began the long history of creating national and exclusive regulation over railways in federal agencies. Congress passed the Federal Railroad Safety Act (FRSA) with the express purpose of promoting safety "in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA confirms Congress' intent to ensure that "laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). Similarly, the Interstate Commerce Commission Termination Act (ICCTA) governs railroad operations and explicitly provides that the remedies contained in the ICCTA are exclusive with respect to rail transportation. 49 U.S.C. § 10501(b).

The FRSA and ICCTA include express preemption provisions which preempt claims in state or federal court based on subject matter related to rail safety and regulated by government agencies so long as the railroad complied with the regulation. However, they do not expressly address whether tribal courts may entertain claims for relief that would be preempted in state or federal court. *See* 49 U.S.C. §§ 10501; 49 U.S.C. § 20106(a)(2). Consequently, the absence of express preemption of conflicting tribal law provisions parallel to those applicable to state law or courts creates uncertainty about whether tort claims, which federal law preempts in state and federal court, but asserted

in tribal court against railroads, are preempted.[14] AAR maintains that such claims would be preempted, but uncertainty regarding tribal jurisdiction over non-members could necessitate extensive litigation, at the expense of all stakeholders' time and resources, and would controvert Congress' multiple and unequivocal mandates that the laws governing railroads be uniform in order to protect the Nation's interest in efficient and effective rail transportation. *See El Paso Natural Gas. Co. v. Neztsosie*, 526 U.S. 473, 485-86 (1999) ("The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation."); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) ("The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce . . . .").

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[14] America's railroads are not the only industry subject to statutes that preempt claims in federal or state court, and which do not expressly preempt tribal law or jurisdiction. *See, e.g., El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (Tribal exhaustion inapplicable to claims arising under Price-Anderson Act because by its preemption provisions "Congress . . . expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested."). *Compare Coppe v. Sac & Fox Casino Healthcare Plan*, No. 14-2598-RDR, 2015 U.S. Dist. LEXIS 20992, *8-*9 (D. Kan. March 13, 2015) (ERISA preempts the field with respect to enforcement for nongovernmental plans), *with MacDonald v. Ellison*, No. SC-CV-44-96, 7 Navajo Reporter 429, 431-34 (Navajo Nation Sup. Ct. 1999) (concluding first that ERISA did not apply to the case before it, and second, if it did, it did not preempt the tribal court action).

Despite these congressional directives that federal law govern America's railroads, uncertainty continues to exist given that railroads have little choice but to have a variety of agreements with tribal nations, tribal entities, and tribal members, ranging from federally authorized easements or rights-of-way, to maintenance, supply, or personnel-related agreements. As this Court has held, congressionally granted rights-of-way, like those over which America's railroads on tribal lands predominately run, are the equivalent of non-Indian fee land and subject to *Montana*'s general rule. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

Requiring clear and unequivocal consent to tribal court civil adjudicatory jurisdiction and, if applicable, tribal law, whether on tribal lands, federally granted rights-of-way, or on-reservation non-Indian fee land would have the beneficial effect of allowing nonmember businesses, tribes, and tribal members to fashion their agreements and conduct to efficiently afford the dispute resolution mechanism they intend. Indeed, the absence of tribal court jurisdiction where such consent has not been given does not present hardship to erstwhile tribal court plaintiffs, because state or federal courts will be available to address any claim. *See Strate*, 520 U.S. at 459.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit.

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September 2015

AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,
Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY, JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOHN DOE, SR. AND JANE DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CHEROKEE NATION, THE CHICKASAW NATION, THE CHOCTAW NATION OF OKLAHOMA, THE MUSCOGEE (CREEK) NATION, THE SEMINOLE NATION OF OKLAHOMA, AND THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation of Oklahoma, the Muscogee (Creek) Nation, and the Seminole Nation of Oklahoma—each of which is a federally recognized Indian tribes, 80 Fed. Reg. 1942 (Jan. 14, 2015)—as well as the Inter-Tribal Council of the Five Civilized Tribes, the members of which are representatives from the five individual amicus tribes. Each tribe exercises jurisdiction within the boundaries of the State of Oklahoma. Each tribe's constitution establishes a system of independent courts that, in accordance with applicable tribal and federal law, resolve disputes arising in tribal territory involving members and nonmembers. The question presented in this case concerns the scope of those courts' jurisdiction. Amici thus have an interest in the Court's resolution of that question.[1]

SUMMARY OF ARGUMENT

I. This Court has repeatedly recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997). Consistent with that recognition, the Court has held that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). Under this precedent, which

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[1] The parties have filed blanket letters of consent with the clerk. This brief was not authored in whole or in part by counsel for any party, and no party or person other than amici, its members, and its counsel provided any monetary contribution to fund the preparation or submission of this brief.

relied on this Court's landmark decision in *Williams* v. *Lee*, 358 U.S. 217 (1959), it is clear that the tribal courts of respondent Mississippi Band of Choctaw Indians have jurisdiction to hear the tort claim brought in this case by a tribal member against a nonmember company for injury inflicted by the company's employee while working on tribal land.

Arguing the contrary, petitioners rely in part on various treaties. But the fact that those treaties do not explicitly grant tribal courts jurisdiction to hear civil claims against nonmembers does not help petitioners because tribes' retained inherent authority provides a sufficient independent basis to establish jurisdiction. *Strate*, 520 U.S. at 449-450 (discussing *Montana*). In any event, the treaties affirmatively support the existence of tribal court jurisdiction over civil claims against nonmembers arising from activities on tribal land.

II. The amicus brief filed by Oklahoma and other States makes sweeping yet strikingly unsupported attacks on tribal judicial systems. Those attacks should be disregarded—as the Court has previously done with similar attacks. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18-19 (1987). Contrary to the States' assertions, amici's judicial systems (like those of many other tribes) are quite similar to federal and state judicial systems: They are independent; operate according to rules of civil procedure; adhere to a code of judicial conduct; apply constitutional, statutory, and common law; provide for appellate review; and publish their decisions. Indeed, the judicial system of the leading state amicus (Oklahoma) itself accords full reciprocal faith and credit to decisions by tribal courts. There is no basis to conclude that tribal courts generally cannot ensure a fair proceeding for nonmembers, such that *all* tribal courts should be deprived of jurisdiction over claims like the one here.

ARGUMENT

I. TRIBAL COURTS HAVE JURISDICTION OVER CIVIL DISPUTES BETWEEN MEMBERS AND NONMEMBERS THAT ARISE FROM ACTIVITIES ON TRIBAL LAND

The tribal court in this case asserted jurisdiction based on the so-called first *Montana* exception to the general rule that tribes lack jurisdiction over nonmembers' activities. That exception provides that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). The Fifth Circuit correctly sustained the tribal court's exercise of jurisdiction here, and this Court—both under its precedent and as a matter of first principles—should do so as well. Tribes have inherent authority to assert civil jurisdiction over claims between members and nonmembers that arise out of activity on tribal land. The contrary arguments advanced by petitioners and their state amici lack merit.

A. Indian Tribes Have Inherent Sovereignty To Exercise Tribal Court Jurisdiction Over Claims By Members Against Nonmembers For Torts Arising On Tribal Land

Despite their incorporation into the United States, Indian tribes "retain their inherent power ... to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. Although "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers" generally, *id.* at 565, this Court has held that that "[t]ribal authority over the activities of non-Indians *on reservation lands* is an important part of tribal sovereignty," *Strate* v. *A-1 Contractors*, 520

U.S. 438, 451 (1997) (emphasis added). Accordingly, this Court has held, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Montana*, 450 U.S. at 565. The first *Montana* exception is one embodiment of that retained jurisdictional power.[2]

In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court addressed "the type of activities [it] had in mind" in subsequently crafting the *Montana* exceptions. *Strate*, 520 U.S. at 457. Specifically, the Court held in *Williams* that the right of Indian tribes "to make their own laws and be ruled by them" includes exclusive jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. 358 U.S. at 220; *see also Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008). That holding was driven by the Court's recognition that "the exercise of state jurisdiction" in such a case "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223.

Williams thus makes clear that although this Court has not explicitly decided "the question of tribal-court jurisdiction over nonmember defendants in general," *Nevada* v. *Hicks*, 533 U.S. 353, 358 n.2 (2001), a tribal court's authority to adjudicate disputes between Indians and non-Indians that arise in tribal territory is in fact an aspect of the tribes' right "to make their own

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[2] The second *Montana* exception is that a "tribe may ... exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566.

laws and be ruled by them," 358 U.S. at 220. *Williams* also established that this rule holds regardless of whether the plaintiff is an Indian and the defendant a non-Indian, or vice-versa. *See id.* at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there."); *see also Hicks*, 533 U.S. at 358 n.2 (observing that the ultimate question is whether the tribe "possess[es] authority to regulate the activities of nonmembers," because where it does, "civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," regardless of whether the suit involves "nonmember plaintiffs [or] nonmember defendants").[3] The relevant consideration under *Williams* is simply the connection between the activities at issue, a member of the tribe, and tribal land.

The principles underlying *Williams* and the *Montana* exceptions remain sound. The exercise of tribal jurisdiction over disputes between members and nonmembers arising on tribal land is essential to providing the rule of law that guides the expectations of all people residing in, working in, and visiting tribal territory. Tribal courts serve that vital function by interpreting tribal enactments, making common law, and applying federal law. Their ability to serve this function is especially important in a case like this, where the nonmember defendant's employee allegedly sexually assaulted an Indian child while working on tribal land. More generally, tribal court jurisdiction is critical to the protection of the individual rights guaranteed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, as tribes

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[3] Indeed, the interference with tribal self-government is *greater* if tribal members cannot rely on tribal courts to resolve their claims against nonmembers arising on Indian lands.

have exclusive civil jurisdiction over claims brought under that statute by members and nonmembers alike, *see Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59-72 (1978) (declining to imply a federal cause of action to enforce the ICRA, and relying on tribal forums to enforce its terms).

Importantly, this Court has never found tribal court civil jurisdiction lacking where the dispute arose from a nonmember's activities on tribal land and involved a member. In contrast, the Court in *Strate* found no tribal court jurisdiction where "the Tribes were strangers to the accident": the "dispute [was] distinctly nontribal in nature, arising between two non-Indians involved in a run-of-the-mill highway accident" on land that was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 440, 454, 457; *cf. Hicks*, 533 U.S. at 355, 358 n.2, 364, 370 (given "the State's interest in pursuing off-reservation violations of its laws," tribal court lacked jurisdiction "over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation").

In short, this Court's case law—and the principles on which those cases rest—demonstrate that tribal courts have jurisdiction to hear claims brought, as in this case, against a nonmember for tortious conduct committed on tribal land against a member.

B. Petitioners' Treaty-Based Responses Lack Merit

Petitioners' arguments against jurisdiction are meritless. In particular, petitioners claim (Br. 16, 23-30) that, notwithstanding the first *Montana* exception,

various treaties "make clear that tribes ... have been divested of the inherent authority to subject nonmembers to civil suit in tribal court." That argument was neither pressed nor passed upon below; nor was it presented in the petition for certiorari. In any event, the argument fails because, irrespective of the treaties, tribal civil jurisdiction may—and does—exist as a function of inherent authority under *Montana*. Even if that were not the case, the treaties themselves support the existence of tribal civil jurisdiction.

1. The treaties are irrelevant to jurisdiction under *Montana*

Citing *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), petitioners assert (Br. 23-24) that the Mississippi Choctaw courts lack civil jurisdiction here because such jurisdiction is foreclosed by treaties. Petitioners' suggestion that a jurisdictional grant under treaties is necessary for jurisdiction to exist, i.e., that the absence of such a grant is sufficient to defeat jurisdiction, reflects a misunderstanding of the relationship between the *Montana* exceptions, treaties, and retained inherent authority.

Inherent sovereignty is based on the tribes' original rights of self-government, *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978), and is not dependent on a treaty grant. To be sure, this Court stated in *National Farmers* that determining "a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-856. But the Court subsequently clarified that this "careful examination" of trea-

ties and statutes determines only whether the terms of those treaties and statutes are sufficient to establish the jurisdiction that the tribe claims, and that the *Montana* exceptions provide a separate and independent basis for tribal jurisdiction:

> The Court's recognition in *National Farmers* ... of the need to inspect relevant statutes, treaties, and other materials[] does not limit *Montana*'s instruction. As the Court made plain in *Montana*, the general rule and exceptions there announced govern only *in the absence of a delegation of tribal authority by treaty or statute.* In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those measures did not aid the Tribe's case. See 450 U.S. at 557-563. Only after and in light of that examination did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana*'s general rule and exceptions to it.

Strate, 520 U.S. at 449-450 (emphasis added); *see also Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 649-650 (2001) ("*For powers not expressly conferred them by federal statute or treaty*, Indian tribes must rely upon their retained or inherent sovereignty." (emphasis added)). Accordingly, although the tribe in *Strate* "refer[red] to no treaty or statute authorizing" tribal jurisdiction over the tort suit, 520 U.S. at 456, the Court nonetheless considered whether such jurisdiction could be sustained under one of the *Montana* exceptions. *Id.* ("To prevail here, petitioners must show that Fredericks' tribal-court action against nonmembers qualifies under one of Montana's two exceptions."). Similarly, in *South Dakota* v. *Bourland*, after determining that a

federal statute had "abrogated" the tribe's treaty-based jurisdiction, 508 U.S. 679, 687-691 (1993), the Court expressly recognized the *Montana* exceptions as a separate potential source of tribal jurisdiction, and left their applicability to be resolved on remand, *id.* at 695-696.

Put simply, "controlling provisions in treaties and statutes" and "the two [*Montana*] exceptions" constitute independent bases for *establishing* tribal court jurisdiction, *Strate*, 520 U.S. at 453, not, as petitioners argue (Br. 16, 47), for *denying* it—much less for denying it to all tribes in all circumstances. To defeat tribal jurisdiction, petitioners must show that neither basis is available.

2. The treaties that petitioners cite support rather than undermine the existence of tribal civil jurisdiction

Petitioners cite a number of treaties involving the Choctaw and Chickasaw Nations, including the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830) ("1830 Treaty") and the Treaty with the Choctaws and Chickasaws, 11 Stat. 611 (1855) ("1855 Treaty").[4] But those treaties—besides being wholly irrelevant to the Mississippi Choctaw's jurisdiction, as they deal with tribal authority over the Choctaw Nation's lands in Oklahoma, not Mississippi—preserve rather than extinguish tribal civil jurisdiction over nonmembers.

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[4] The rights held by the Choctaw Nation under the 1830 Treaty were subsequently secured to the Chickasaw Nation by Article 1 of the Treaty Between the Choctaws and Chickasaws, 11 Stat. 573, 573 (1837). *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

a. The 1830 Treaty recognizes tribal civil jurisdiction over nonmembers

Citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), petitioners argue (Br. 25) that the 1830 Treaty supports their assertion that Indian tribes lack civil jurisdiction over nonmembers. That is meritless.

The Court in *Oliphant* concluded—based on a "treaty provision 'express[ing] a wish that Congress may grant to the Choctaws the right of *punishing* by their own laws any white man who shall come into their nation, and infringe any of their national regulations'"—that "the Choctaws did not have *criminal* jurisdiction over non-Indians absent congressional authority." 435 U.S. at 197, 199 (emphases altered). In all other respects, however, the treaty "guaranteed to the Tribe 'the jurisdiction and government of all the persons and property that may be within their limits.'" *Id.* at 197; *see also supra* n.4 (noting that the Chickasaw Nation has also been a beneficiary under the treaty since soon after the treaty's adoption). "[T]he broad terms of this governmental guarantee," *id.* at 197, thus affirmed that the Choctaw and Chickasaw Nations retained *civil* jurisdiction over non-Indians. And even if there were doubt about the matter, it would have to be resolved pursuant to Article 18 of the treaty, which provides that "in the construction of this Treaty whenever well founded doubt shall arise, it shall be construed most favorably towards the" Nations. 1830 Treaty art. 18, 7 Stat. 336.

Oliphant's holding accords with the Court's more general recognition that "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings." *Strate*, 520 U.S. at 449; *see also Duro* v. *Reina*, 495 U.S. 676, 687 (1990); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers*, 471

U.S. at 853-856. It also accords with the conclusion the U.S. Attorney General reached about the 1830 Treaty—in an opinion this Court has looked to repeatedly. Congress, the Attorney General opined, "has legislated ... by taking jurisdiction in criminal matters, and *omitting to take jurisdiction in civil matters*. ... By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation." 7 Op. Att'y Gen. 174, 180-181 (1855) (emphasis added), *quoted in National Farmers*, 471 U.S. at 855, *and cited in Oliphant*, 435 U.S. at 199. The Attorney General also confirmed that a predecessor's opinion similarly concerned only tribes' *criminal* jurisdiction over nonmembers. *See* 7 Op. Att'y Gen. at 184 (citing 2 Op. Att'y Gen. 693 (1834)); *see also* Treaty with the Cherokee Indians art. 13, 14 Stat. 799, 803 (1866) ("[T]he judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.").[5]

Petitioners also claim (Br. 27) that Article VII of the 1830 Treaty shows that "the Federal Government would resolve all aspects of any disputes between the tribes and American citizens." Even a glance at Article VII belies petitioners' sweeping assertion. That article pertains to criminal (and specifically prosecutorial) jurisdiction, providing that "acts of violence committed

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[5] Relying on *Alberty* v. *United States*, 162 U.S. 499 (1896), petitioners claim (Br. 29) that the Cherokee Nation "disavowed any civil or criminal jurisdiction over even nonmembers who married citizens of the Nation." But it is a tribe's prerogative to decline to exercise jurisdiction within its sovereign authority.

upon persons or property of the people of the Choctaw Nation either by citizens of the U.S." or other tribes "shall be reffered [sic] to ... the President" to "see that every possible degree of justice is done." Indeed, petitioners' reading of Article VII is inconsistent with *Williams* v. *Lee*; as discussed, there this Court held that tribal civil jurisdiction existed over an action brought by a non-Indian against an Indian, notwithstanding Article I of the Treaty with the Navajo Indians, 15 Stat. 667, 667-668 (1868)—which, like the 1830 Treaty, provides for the United States to punish the wrongdoer where one sovereign's citizen wrongs the person or property of a citizen of the other sovereign. *See* 358 U.S. at 221 (discussing treaty of 1868).

b. The 1855 Treaty protects civil tribal jurisdiction over persons residing in, working in, or visiting tribal territory

Petitioners contend (Br. 26-27) that Article 7 of the 1855 Treaty specifically excludes tribal jurisdiction over nonmembers. That is true, but petitioners ignore the fact that the article *also* excepts from that exclusion nonmembers residing in, working in, or visiting tribal territory. Article 7 first provides broadly that "the Choctaws and Chickasaws shall be secured in the ... full jurisdiction, over persons and property, within their respective limits." 11 Stat. 612-613. It next excludes from this jurisdiction "all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe." *Id.* at 613. But then it exempts from this exclusion—i.e., places back within the tribes' jurisdiction—"[s]uch individuals ... peacefully travelling, or temporarily sojourning in the country or trading there-

in, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes." *Id.*[6] And again, any doubt about the meaning of this language—that is, about the extent of this exception to the exception—must be resolved in favor of the tribes, because "Indian treaties are to be interpreted liberally in favor of the Indians," with "any ambiguities ... resolved in their favor." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

c. The treaty-indemnification provisions that petitioners cite are irrelevant

Even further afield is petitioners' attempt (Br. 28) to characterize Article 14 of the 1855 Chickasaw and Choctaw Treaty, and Article 18 of the 1856 Creek and Seminole Treaty, as "provid[ing] indemnification for certain injuries suffered by Indians at the hands of citizens, affording a remedy akin to civil tort damages." These indemnification provisions are not tort-like at all; they relate only to the United States' promise to "protect the [tribes] from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws upon the same principle." 1855 Treaty art. 14, 11 Stat. 614-615; Treaty with the Creeks and Seminoles art. 18, 11 Stat. 699, 704 (1856). The provisions say nothing about tribal jurisdiction over civil suits against nonmembers.

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[6] Article 15 of the 1856 Creek and Seminole Treaty contains virtually identical language, 11 Stat. 699, 703-704, which defeats petitioners' reliance on that treaty (Br. 27) as well.

C. This Court Has Already Rejected The State Amici's Other Arguments Against Tribal Jurisdiction

Petitioners' state amici advance several other arguments in hopes of avoiding the clear implications of this Court's precedents. But those arguments have already been rejected by this Court.

1. The States contend (Br. 8-12) that tort claims are not a valid means of regulation under the first *Montana* exception. That claim is refuted by *Plains Commerce*, which makes clear that the application of tort law through the exercise of civil jurisdiction *is* a "form of regulation" under *Montana*. 554 U.S. at 331-332 ("tribal tort law ... regulates the substantive terms on which the Bank is able to offer its fee lands for sale"). Imposing tort liability for the sexual molestation of a minor, as alleged in this case, also falls squarely within "[t]he logic of *Montana*[, which] is that certain activities [even] on non-Indian fee land (say, a business enterprise employing tribal members) ... may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities ... may be regulated." *Id.* at 334-335. Non-Indian activity on tribal lands that affects the well-being of minor tribal members in the way alleged here a fortiori intrudes on internal tribal relations. And denying the Mississippi Choctaw (or any tribe) the right to protect its minor members in its own courts gravely threatens self-rule.[7]

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[7] The States note (Br. 2) that tribal land and businesses are often interspersed with non-tribal land and businesses, and they profess concern about the possibility of different legal regimes applying depending on whether a rest stop to which a non-Indian traveler on a highway happens to go is owned by an Indian or a non-Indian. But similar scenarios can arise throughout the coun-

2. The States also argue (Br. 16) that express consent should be required for tribal tort jurisdiction to exist because of the "opaqueness of tribal tort law." But there is nothing "opaque" or otherwise surprising about the possibility of tort liability based on the sexual molestation of a minor. To the contrary, such misconduct is proscribed everywhere in the United States. And this Court has recognized that a nonmember may consent to the imposition of tribal law "either expressly *or by his actions*." *Plains Commerce*, 554 U.S. at 337 (emphasis added). There is no basis to depart from that precedent, again certainly not in the context of the conduct alleged here.

3. Finally, the States contend (Br. 12-14) that tribes' power of exclusion cannot support the exercise of tribal jurisdiction over tort claims involving nonmembers. But they concede (Br. 14) what this Court recognized in *Plains Commerce*: that the power of exclusion "forms one of the bases for the *Montana* exceptions." 554 U.S. at 335. That power applies here because this case, like *Williams*, arises from conduct on tribal (trust) land, *see* Resp. Br. 8. And on such land, "in accord with *Montana*, ... tribes retain considerable control over nonmember conduct." *Strate*, 520 U.S. at 454. Through that power, tribes can regulate nonmembers by conditioning their entry onto tribal lands on the use of reasonable care in interacting with minors and

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try, where borders between States are frequently not marked and travelers thus do not know precisely what legal regime they are subject to at every moment. The scenario that appears to so worry the States, moreover, could just as easily occur in the reverse, with an Indian traveler on the same highway unknowingly patronizing a non-Indian-owned business. The States surely would not agree that that is a basis to deprive *their* courts of jurisdiction over tort claims brought by *their* citizens against such a traveler.

the avoidance of intentional harm to minors. The application of tort law through the exercise of tribal adjudicative jurisdiction simply enforces such conditions.

II. AMICI HAVE DEVELOPED INDEPENDENT JUDICIAL SYSTEMS, AND THEIR COURTS FAIRLY RESOLVE DISPUTES INVOLVING MEMBERS AND NONMEMBERS

Much of the States' argument against tribal jurisdiction here rests on a sweeping indictment of all tribal judicial systems. With strikingly few citations, the States broadly condemn tribal courts as biased and lacking independence, and tribal law as mysterious, inaccessible, and indeed all but incoherent. Based on this far-reaching attack, the States—despite asserting (Br. 9, 11) that "tribal court systems vary wildly," and contrary to their argument that "[t]his Court should not impose a one-size-fits-all rule"—urge the Court to deprive *every* tribal court in the country of jurisdiction over civil tort claims like the one asserted here.

That argument is wholly unfounded. Contrary to the States' expansive (yet, as noted, remarkably citation-free) claims, the tribes submitting this brief, like many others, have sophisticated judicial systems—similar in many ways to those of the United States and most if not all States—that fairly and efficiently resolve disputes involving members and nonmembers.

This Court has "rejected similar attacks on tribal court jurisdiction in the past," *LaPlante*, 480 U.S. at 19, and it should do so again here. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*, 436 U.S. at 65. Denying tribal jurisdiction based on concerns about "local bias and incompetence," the Court has said, "would

be contrary to the congressional policy promoting the development of tribal courts." *LaPlante*, 480 U.S. at 18-19. "Moreover, the [ICRA] provides non-Indians with various protections against unfair treatment in the tribal courts." *Id.* at 19.

To ensure that the Court's decision in this case is not influenced by the highly distorted picture of tribal courts that appears in the States' brief, amici describe their systems in detail.[8]

Amici's judicial systems closely resemble those of the United States and the States. Under each amicus's constitution, for example, the judiciary is one of three independent branches of government. *See* Cherokee

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[8] The States' arguments here, including the suggestion that their own courts are somehow superior to tribal courts, conflicts with what their counsel has argued elsewhere. The States assert (Br. 17) that their courts "have always provided an adequate and fair forum" for the resolution of tort claims between members and nonmembers. But in *Oklahoma Water Resources Board* v. *United States*, No. 110375 (Okla.), the Oklahoma Attorney General—counsel of record on the States' amicus brief—asserted that the trial courts of his own State are *not* an adequate forum for disputes between Indians and non-Indians. There, the Attorney General petitioned the Oklahoma Supreme Court to assume original jurisdiction over an action that names the United States as trustee for the Chickasaw and Choctaw Nations, and seeks to determine the Nations' water rights. The Attorney General argued that the state high court needed to take original jurisdiction so as to "avoid important matters affecting the entire State from being decided by local judges, who are subject to local political pressures." Application to Assume Original Jurisdiction 4 (Feb. 10, 2012). (The United States subsequently removed that action to federal court. *See Oklahoma Water Res. Bd.* v. *United States*, No. 12-275 (W.D. Okla. Mar. 12, 2012).) The Attorney General cannot have it both ways.

Const. art. V[9]; Chickasaw Const. art. V[10]; Choctaw Const. art. V[11]; Muscogee Const. art. VII, § 1[12]; Seminole Const. art. XVI.[13] Each tribal judicial system is headed by a constitutionally established Supreme (or Constitutional) Court, with ultimate authority to interpret the tribal constitution and laws. *See* Cherokee Const. art. VIII, § 4; Chickasaw Const. amend. V, § 1; Choctaw Const. art. XIII, § 1; Muscogee Const. art. VII, § 1; Seminole Const. art. XVI, § 2. The justices of these courts are either elected in regular, popular elections, Chickasaw Const. amend. V, § 3, or appointed by the executive and confirmed for set terms by the tribal legislature, Cherokee Const. art. VIII, § 2; Choctaw Const. art. XII, § 3; Muscogee Const. art. VII, § 2; Seminole Const. art. XVI, § 4.

Amici also have legislatively established lower courts that exercise original jurisdiction within their territories. Cherokee Const. art. VIII, §§ 1, 6; Chicka-

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[9] Constitution of the Cherokee Nation, *available at* http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf.

[10] Constitution of the Chickasaw Nation, *available at* https://www.chickasaw.net/Documents/Long-Term/CN_Constituion_Amended2002.aspx.

[11] Constitution of the Choctaw Nation of Oklahoma, *available at* http://s3.amazonaws.com/choctaw-msldigital/assets/158/constitution_1983_original.pdf.

[12] Constitution of the Muscogee (Creek) Nation, *available at* http://www.creeksupremecourt.com/index.php/mcn-constitutiion.

[13] Constitution of the Seminole Nation of Oklahoma, *available at* http://sno-nsn.gov/Government/GeneralCouncil/CodeofLaws/2015/00%20Seminole%20Nation%20Constitution%20%282013%29.pdf.

saw Nation Code § 5-201.1[14]; An Act Establishing a Court of General Jurisdiction for the Choctaw Nation of Oklahoma ("Choctaw Courts Act") § 1.101[15]; Muscogee Code tit. 26, § 2-101[16]; Seminole Code tit. 5, § 101.[17] Decisions of the lower courts can be appealed to either the tribal Supreme Court, *see* Cherokee Const. art. VIII, § 4; Chickasaw Const. amend. V, § 4; Muscogee Code tit. 26, § 2-101, or to a tribal Court of Appeals, *see* Choctaw Code Civ. P. § 952.[18] Lower-court judges are either appointed to regular terms by the tribe's Supreme Court, *see* Chickasaw Nation Code § 5-202.3, appointed by the executive and approved by the legislature, *see* Cherokee Code tit. 20, §§ 12-13[19]; Choctaw Courts Act § 1.104; Muscogee Code tit. 26, § 3-101(C), or nominated by a Judicial Review Committee, submitted by the executive, and then selected by the legislature, Seminole Code tit. 5, § 103. Judges must generally be licensed attorneys. *See* Cherokee Code tit. 20, § 12; Choctaw Courts Act § 1.103; Muscogee Code tit. 26, § 3-101(A);

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[14] Chickasaw Nation Code, *available at* https://www.chickasaw.net/Our-Nation/Government/Chickasaw-Code.aspx.

[15] Uncodified Choctaw Nation laws are available by request from the Nation's judicial system. Codified Choctaw Nation laws are available at http://www.choctawnation.com/government/tribal-court/.

[16] Muscogee (Creek) Nation Code, *available at* http://www.creeksupremecourt.com/index.php/mcn-code.

[17] Seminole Nation of Oklahoma Code of Laws, *available at* http://sno-nsn.gov/government/codeoflaws.

[18] Choctaw Nation of Oklahoma Code of Civil Procedure, *available at* http://s3.amazonaws.com/choctaw-msldigital/assets/1275/codeofcivilprocedure_original.pdf.

[19] Cherokee Code, *available at* http://www.cherokee.org/attorneygeneral/TribalCode.aspx.

Chickasaw Code § 5-202.2(3); Seminole Code tit. 5, §§ 102(a), 203(a).[20] And they may be removed from office only for cause, such as for violations of judicial canons, conviction of certain crimes, disbarment, gross incompetence, or negligence. *See* Cherokee Code tit. 20, § 17; Choctaw Courts Act § 2-104; Chickasaw Nation Code § 5-202.10; Muscogee Code tit. 26, § 3-101(D); Seminole Code tit. 5, §§ 110, 210. Amici's courts must meet on a regular basis. *See* Cherokee Code tit. 20, § 21; Chickasaw Nation Code §§ 5-101.3, 5-202.6(2); Choctaw Courts Act § 1.114; Muscogee Const. art. VII, § 4; Muscogee Code tit. 26, § 2-103; Seminole Code tit. 5, §§ 106(b), 207(b).

Tribal law also imposes rules of judicial conduct. *See* Cherokee Code tit. 20, § 59; Cherokee Code tit. 20, app. I, R. 161; Cherokee Code tit. 20, app. II, R. 60-62; Chickasaw Nation Code § 5-101.6; Choctaw Courts Act § 2-104(A)(1); Muscogee Creek Code tit. 26, ch. 4; Seminole Code tit. 5, §§ 111, 211. Those codes require judges to maintain the independence of the tribal judiciary, avoid impropriety and the appearance of impropriety in all their activities, conduct the business of the court with proper dignity, disqualify themselves in cases of conflicts of interest, and avoid political activity and other outside activities that might call their independence into question. Violations of judicial canons are punishable by removal from office, under procedures set by tribal law. Chickasaw Nation Code § 5-202.10; Choctaw Courts Act § 2-104(B)-(C). Tribal law imposes addition-

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[20] Alternatively, the Chickasaw Nation allows a non-licensed attorney to serve as a judge if he or she meets certain criteria, including having graduated from an ABA-approved law school or tribally approved paralegal program and having practiced as a lay advocate before the Nation's courts for five years. Chickasaw Nation Code § 5-202.2(4).

al burdens on judges to disqualify themselves from cases in which they have a conflict of interest, and sets the legal procedures by which disqualification must occur. *See* Cherokee Code tit. 20, § 59 (Supreme Court Justices); *id.* app. I, R. 161; *id.* app. II, R. 60-62 (district court judges); Chickasaw Nation Code tit. 5, ch. 1, arts. D-E (Supreme Court Justices); *id.* § 5-202.11 (district court judges); Choctaw Courts Act § 2-102 (district court judges); *id.* § 2-103 (appellate court judges); Muscogee Code tit. 26, § 4-103(C); Seminole Code tit. 5, § 111 (district court judges); *id.* § 211 (Supreme Court Justices).

Amici also have detailed (and published) rules of civil procedure that govern all aspects of a civil case and protect the procedural rights of litigants. *See* Cherokee Code tit. 20, app. I & II; Chickasaw Nation Code tit. 5, ch. 2; Choctaw Code Civ. P.; Muscogee Code tit. 27, app. 1; Seminole Code tit. 3. These comprehensive provisions parallel the Federal Rules of Civil Procedure in many respects. *Compare, e.g.*, Chickasaw Nation Code tit. 5, ch. 2, arts. I-J, *with* Fed. R. Civ. P. tit. III & IV (pleadings and parties); *compare* Chickasaw Nation Code tit. 5, ch. 1, art. K, *with* Fed. R. Civ. P. tit. V (disclosures and discovery); *compare* Choctaw Code Civ. P. ch. 2A, R. 13, *with* Fed. R. Civ. P. 56 (summary judgment); *see also In re: Amend. & Adoption of Dist. Ct. R. & Pro.*, SC-AD-13-04 (Cherokee 2013) (order of Cherokee Nation Supreme Court adopting Federal Rules of Civil Procedure and Evidence as guidance for district court proceedings).

Amici's courts—again like those of the United States and most States—apply statutory and common law as recorded in their constitutions, laws, and case law. *See, e.g.*, Cherokee Code tit. 20, § 11; Chickasaw Nation Code § 5-201.6 (district courts); *id.* § 5-102.7 (Supreme Court); Choctaw Code Civ. P. § 2; Muscogee

Code tit. 27, § 1-102(B); Seminole Code tit. 5, § 7. When these are in doubt or inapplicable, the courts are permitted to apply tribal customs and usages to determine the meaning of the law, *see* Chickasaw Nation Code §§ 5-102.7, 5-201.6; Muscogee Code tit. 27, § 1-104; Seminole Code tit. 5, § 7, or fill in gaps in the law, *see* Choctaw Code Civ. P. § 2, just as federal and state judges do. And if there is doubt about tribal customs and usages, the courts are allowed to consider the advice of elders, Muscogee Code tit. 27, § 1-104; Seminole Code tit. 5, § 7, or legislators familiar with the customs and usages, Chickasaw Nation Code § 5-208.11(D), to determine how they ought to be applied. Additionally, when none of these sources addresses the issue at hand, the Chickasaw and Seminole Nations' courts may apply applicable federal or state law, or Department of Interior regulations. *See* Chickasaw Nation Code §§ 5-102.7, 5-201.6; Seminole Code tit. 5, § 7. The Muscogee Code tit. 27, § 1-103(C), and the Seminole Code tit. 5, § 7, also allow the application of Oklahoma law in limited circumstances.

None of this is remarkable; reliance on elders to inform a tribal court's judgment on questions of tribal custom, for example, is substantively no different from reliance on expert testimony in federal court under Federal Rule of Evidence 702—or, indeed, this Court's consideration of amicus filings under its Rule 37. Yet the States assail tribal courts' option to rely on tribal custom in making the common law. In particular, they assert (Br. 10) that "tribal courts may consult with elders or councilors in different quantities, with different frequencies, and with little opportunity for advocates to argue or be informed about how such elders decide what customs should apply in a given case." But they cite nothing to support that contention, apparently ex-

pecting this Court to blindly credit their every claim. There is no basis for the Court to do so.

Indeed, while reliance on tribal elders' testimony to determine tribal customs appears to be of particular concern to the States, this Court and other federal courts have relied on such testimony for more than a century. *See, e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 25-26, 31-32 (1899) (relying on testimony of tribal members to determine tribal inheritance practices); *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1237 (E.D. Wash. 1997) (treating tribal elder as the "ultimate expert" on tribal understanding of treaty's terms at time it was signed), *aff'd sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). That is hardly surprising, given that tribal elders are often the most authoritative sources in their areas of knowledge. *See United States* v. *Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash.) ("An additional method of locating tribal fishing locations subsequent to entering into treaties was established in these proceedings, upon the credible testimony of tribal elders who speak from personal experience or data acquired from other sources."), *aff'd sub nom. Puget Sound Gillnetters Ass'n* v. *United States Dist. Ct. W. Dist. Wash.*, 573 F.2d 1123 (9th Cir. 1978), *vacated on other grounds sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Amici's judicial systems also allow for appeals, which are governed by rules of appellate procedure. *See* Cherokee Code tit. 20, app. I; Chickasaw Nation Code tit. 5, ch. 1, art. B; Choctaw Code Civ. P. app. I; Muscogee Code tit. 27, ch. 3; *id.* tit. 27, app. II; Seminole Code tit. 1. And—contrary to the state amici's bald assertion (Br. 3) that "even if the tribal court issued published opinions ..., one cannot simply do a

Westlaw search for those opinions"—the decisions of the Chickasaw and Choctaw Nations' Supreme Courts, along with Chickasaw district court decisions, are published in the Oklahoma Tribal Court Reports, which is available on Westlaw (Okla. Trib.), going back decades. Similarly, the Cherokee Nation's Supreme Court decisions are published in West's American Tribal Law Reporter, which has been produced since 1997 and is also available on Westlaw (Am. Tribal Law); the Cherokee Nation also publishes its Supreme Court opinions, and some district court opinions, on its Judicial System's website.[21] The Muscogee (Creek) Supreme Court likewise posts its opinions on its website.[22] Some Muscogee (Creek) district court and Supreme Court opinions are also published in the Oklahoma Tribal Court Reports.[23]

Finally, the States argue (Br. 18) that the decision below "undermines Congress's policy—embodied in 28 U.S.C. § 1441—of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sov-

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[21] http://www.cherokeecourts.org/SupremeCourt/SupremeCourtCaseOpinionsandInformation.aspx; http://www.cherokeecourts.org/DistrictCourt/DistrictCourtDecisions.aspx.

[22] http://www.creeksupremecourt.com/index.php/case-law.

[23] The States argue (Br. 4-5 & n.5) that tribal "appellate courts are typically housed in the same location as the trial court." The suggestion that such physical proximity has any bearing on the integrity of courts' operation is absurd. Indeed, the federal system frequently employs the same approach. For example, the D.C. Circuit is housed in the same building as the D.C. District Court, the Federal Circuit is housed in the same building as the Court of Federal Claims, and the Moakley Courthouse in Boston hosts both the First Circuit and the District of Massachusetts.

ereign to which both parties belong." But a federal forum is available to challenge tribal jurisdiction after exhaustion of tribal remedies, *see National Farmers*, 471 U.S. at 857; *LaPlante*, 480 U.S. at 18-19, and, as discussed immediately below, Oklahoma's own courts determine whether to grant full faith and credit to a tribal court judgment in a tort case (or any other). Further, in determining whether to grant full faith and credit to a tribal court judgment, the tribal court's jurisdiction may be challenged. *Barrett* v. *Barrett*, 878 P.2d 1051, 1054 (Okla. 1994).

The States' denigration of tribal courts is particularly perplexing to amici given that Oklahoma, by both statute and court rule, gives full faith and credit to the judgments of amici's tribal courts—a step one would hardly expect if those courts were the deeply flawed institutions the States try to depict. In 1992, Oklahoma enacted a statute affirming the power of its supreme court to give full faith and credit to the court records and proceedings of tribes that reciprocally recognize Oklahoma state court judgments. 12 Okla. Stat. § 728. Two years later, the Oklahoma high court exercised this authority by issuing a rule that requires Oklahoma courts to give full faith and credit to judgments of tribal courts that reciprocate. R. Dist. Ct. Okla. 30(B), 12 Okla. Stat. ch. 2, app. That rule further requires the Administrative Office of the Courts to maintain a list of the tribal courts granting full faith and credit. R. Dist Ct. Okla. 30(C). All of the amici tribes are on that list. Oklahoma State Courts Network, *Full Faith and Credit of Tribal Courts* (updated July 21, 2015), *at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214. Oklahoma's own conduct in dealing

with amici's courts, then, belies its arguments about those courts here.[24]

In short, contrary to the States' portrayal, amici's courts closely resemble federal and state courts: They are established by (publicly available) constitutions and laws; their structure, personnel, and procedures are set by (publicly available) tribal laws; they apply published tribal statutes and the common law to decide disputes; and their decisions are publicly available, including on the Internet. There is no reason to conclude that they are not as capable as federal and state courts of adequately adjudicating cases and of fully protecting the rights of nonmembers in all cases, including cases raising claims like the one here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[24] Indeed, all three branches of Oklahoma government have recognized the propriety of tribal forums for the adjudication of certain torts. *See Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 367 (Okla. 2013) (holding—based on governor's representations about the intent of the model tribal gaming compact, which the governor had negotiated with tribes and which the legislature had enacted into state law (3A Okla. Stat. § 281 pt. 6)—that under the compact, "tribal courts and tribally designated forums have exclusive civil-adjudicatory jurisdiction over all compact-based tort or prize claim lawsuits.").

Respectfully submitted,

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OCTOBER 2015

AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP., *et al.*,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS GREGORY ABLAVSKY, BETHANY R. BERGER, NED BLACKHAWK, DANIEL CARPENTER, MATTHEW L.M. FLETCHER, MAGGIE MCKINLEY, AND JOSEPH WILLIAM SINGER IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 13-1496

DOLLAR GENERAL CORP., *et al.*,
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INTEREST OF AMICI CURIAE[1]

Amici are historians and legal scholars whose scholarship focuses on Indian law and Indian legal history, including the history of tribal sovereignty and jurisdiction. They accordingly have a scholarly interest

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. Each party's consent to the filing of amicus briefs in support of either party is on file with the Clerk of the Court.

and expertise in the question of the historical scope of tribal jurisdiction over nonmembers, which in turn bears significantly on the question presented in this case: whether a tribal court has jurisdiction over a civil tort suit against a nonmember for a sexual assault committed on tribal land and arising out of the nonmember's consensual commercial relationship with the tribe. Amici therefore submit this brief to provide the Court a more complete and accurate picture of the history of tribal jurisdiction over nonmembers.

Gregory Ablavsky is Assistant Professor of Law at Stanford Law School. His scholarship focuses on the legal history of the early American West, particularly the history of federal Indian law. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015) and *The Savage Constitution*, 63 Duke L.J. 999 (2014).

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INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court reiterated just two Terms ago, "[u]nless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). That

authority derives not from any grant by Congress, but from tribes' status as sovereigns predating the Constitution. Tribes thus possess "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). This retained sovereignty includes the right to "exercise some forms of civil jurisdiction over non-Indians on their reservations," including the adjudication of civil disputes stemming from a consensual relationship between the non-Indian and the tribe. *Montana* v. *United States*, 450 U.S. 544, 565 (1981).

Petitioner Dollar General now asks this Court to reject those holdings, contending (at 16) that "tribes ... have been divested of the inherent authority to subject nonmembers to *civil* suit in tribal court." For that proposition, Dollar General relies on a highly selective presentation of historical evidence, and mischaracterizes what evidence it does present. Its law office history—stripped of the critical context that informs scholarship in the discipline—seriously distorts the actual historical record.

The outer bounds of tribes' "historic sovereign authority," *Bay Mills*, 134 S. Ct. at 2030, have, of course, been contested at times during the lengthy and hard-fought struggle over the possession and control of originally Indian land. Taken as a whole, however, the historical evidence shows that tribal jurisdiction over nonmembers' activities on tribal land, and over civil disputes stemming from those activities, is a part of tribes' inherent sovereignty that has never been divested, either implicitly through incorporation into the United States or explicitly by treaty or statute. To the contrary, the federal government has repeatedly recognized that tribes possess such jurisdiction. *See infra* Part I.

Early treaties—including the first treaty ever signed between a tribe and the United States—expressly recognized tribes' authority to exercise jurisdiction over non-Indians on their land. Similarly, Indian agents sent by the federal government to serve as liaisons with the tribes assisted them in administering tribal law over non-Indians on tribal land, and understood their authority to do so to derive from the tribes, not the United States. *See infra* Part I.A.

In the early nineteenth century, as the States increasingly agitated to obtain control over Indian land, the Five Civilized Tribes developed written constitutions and separate criminal and civil laws modeled after the Anglo-American legal system. Even during the period of forced removal and the establishment of Indian Territory in the West, the federal government continued to acknowledge that non-Indians who voluntarily resided on tribal land were subject to tribal laws and tribal jurisdiction. And tribes exercised that power by developing and enforcing formal laws regulating non-Indians' entry into and conduct on tribal land. *See infra* Part I.B.

Treaties executed after the Civil War likewise expressly recognized tribes' authority to exercise jurisdiction over nonmembers on tribal land. And during the 1870s and 1880s, the Bureau of Indian Affairs helped to establish Courts of Indian Offenses, staffed by judges who were tribal members, which exercised jurisdiction over a wide range of disputes arising on Indian land. Notwithstanding the BIA's role, these courts in no way "impaired tribal authority in the field of law and order." *Powers of Indian Tribes*, 55 Interior Dec. 14, 64 (Oct. 25, 1934). *See infra* Part I.C.

Summing up this lengthy history, in 1934 the Solicitor of the Interior explained that tribal jurisdiction over non-Indians on tribal land "continues to this day, save as it has been expressly limited by the acts of a superior government," and that "attempts of the States to exercise jurisdiction over offenses ... between Indians and whites, committed on an Indian reservation, have been held invalid usurpation[s] of authority." *Powers of Indian Tribes*, 55 Interior Dec. at 57.

Dollar General contends that tribes lack the power to exercise civil jurisdiction over nonmembers unless the federal government expressly confers that power on them. As the Solicitor recognized, however, "[p]erhaps the most basic principle of all Indian law" is that tribes retain their inherent powers unless the federal government has expressly taken those powers away. *Powers of Indian Tribes*, 55 Interior Dec. at 19. Dollar General points to a miscellany of treaty provisions and statutes that it contends reflect a recognition that tribes lack jurisdiction over nonmembers, but it misreads the history it relies on.

For example, Dollar General points to the 1830 Treaty with the Choctaws. But although that treaty made clear that the Choctaw courts lacked *criminal* jurisdiction over non-Indians, the United States recognized that it left the Tribe's *civil* jurisdiction untouched. Dollar General also cites two treaties from the 1850s that apparently withdrew tribal civil jurisdiction over non-Indians. Yet the twenty other treaties entered into at the same time with different tribes contained no such language; and the two treaties at issue were in effect only until the 1860s, when new treaties reaffirmed those tribes' power to exercise civil jurisdiction over nonmembers. Dollar General's remaining authorities are likewise fully consistent with the exercise

of civil jurisdiction over nonmembers. The Indian depredation claims system was essentially a war claims resolution system that did not address ordinary civil torts. Other statutes conferring jurisdiction on federal courts over some disputes arising in Indian country did not make that jurisdiction exclusive, thereby leaving tribal courts' concurrent jurisdiction undisturbed. And as recently as the passage of the Indian Civil Rights Act, Congress evinced a background presumption of tribal jurisdiction over nonmembers. *See infra* Part II.

In short, the historical record refutes Dollar General's contention that tribes have been divested of civil jurisdiction over nonmembers. Tribes therefore retain this important attribute of internal sovereignty.

ARGUMENT

I. INDIAN TRIBES' INHERENT SOVEREIGNTY HAS HISTORICALLY INCLUDED JURISDICTION OVER NON-INDIANS ON TRIBAL LAND

The history of tribal relationships with, and jurisdiction over, non-Indians on tribal land is complex, reflecting the changeable and contested relationships among tribes, settlers, and the United States. But an examination of that history nonetheless reveals that since the earliest encounters between Indian tribes and Europeans, tribes have maintained their inherent authority to govern their lands. As part of that power, tribes have exercised jurisdiction over non-Indians on tribal land, including by establishing and enforcing requirements for entry to and activities on tribal land, as well as by adjudicating disputes involving nonmembers arising out of conduct on tribal land. And the federal government has repeatedly recognized the validity of that jurisdiction, from the time of the Founding to the

present, making clear that tribes' exercise of such jurisdiction is in no way inconsistent with their status as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

A. The Colonial And Early National Era

1. To begin with basic principles, Indian tribes originally possessed all the powers of a sovereign nation. As this Court explained in 1832, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). European conquest and the corresponding discovery doctrine terminated Indian tribes' *external* political sovereignty. *Id.* at 543-544; *see* Cohen, *Handbook of Federal Indian Law* 123 (1941); *see also Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). The tribes' later incorporation into the territory of the United States, moreover, restricted their exercise of separate power to the extent that it "conflict[ed] with the interests of the [the United States'] overriding sovereignty." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

But neither conquest nor incorporation abolished the tribes' sovereign powers of self-government. Cohen 1941, *supra*, at 123. Rather, as the Founders recognized, they remained quasi-independent nations, similar in status to foreign sovereigns, though domestic in nature. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1057-1067 (2015). Although no longer able to convey land to whomever they pleased or engage in political relations with nations outside the United States, *see M'Intosh*, 21 U.S. at 543, tribes otherwise maintained, in the words of Secretary

of State Thomas Jefferson, "full, undivided and independent sovereignty," centered on their inherent right to govern their own land, *Notes on Cabinet Opinions, 26 February 1793*, *in* 25 *Papers of Thomas Jefferson* 271, 272 (Catanzariti ed., 1992).

2. The earliest treaties between the United States and the tribes reflected this expansive, territorial view of tribal sovereignty. Indeed, the very first treaty between the nascent United States and an Indian tribe, the 1778 Treaty with the Delawares, contemplated that the Delawares would have the power to govern the conduct of non-Indians on Delaware land. The treaty prohibited both parties from "proceed[ing] to the infliction of punishments on the citizens of the other" before "a fair and impartial trial [could] be had by judges or juries of both parties, as near as [could] be to the laws, customs and usages of the contracting parties and natural justice." Treaty with the Delawares art. 4, 7 Stat. 13, 14 (1778). Members of Congress were to "fix" the "mode of such tr[i]als," but "with the assistance of such deputies of the Delaware nation" who were "appointed to act in concert with them." *Id.*

Other treaties executed during the early years of the Republic went further still, expressly securing to the tribes the power to exercise jurisdiction over non-Indians on tribal land. Specifically, these treaties authorized tribes to punish "as they please[d]" any "citizen of the United States" who "attempt[ed] to settle on any of the [tribes'] lands." Treaty with Cherokees art. 5, 7 Stat. 18, 19 (1785); Treaty with Chickasaws art. 4, 7 Stat. 24, 25 (1786); Treaty with the Choctaws art. 4, 7 Stat. 21, 22 (1786); Treaty with the Creeks art. 6, 7 Stat. 35, 36 (1790); *see also* Treaty with the Wyandots, Delawares, Shawnees, Ottawas, Chippewas art. 6, 7 Stat. 49, 52 (1795) (similar).

Still other treaties from the era encouraged tribal law enforcement on Indian land to ensure that Indians and non-Indians alike maintained the peace and paid their debts. An 1820 treaty with the Choctaw, for instance, pledged two hundred dollars to enable the Choctaw Nation to assemble a police force "so that good order may be maintained, and that all men, *both white and red*, may be compelled to pay their just debts." Treaty with the Choctaws art. 13, 7 Stat. 210, 213 (1820) (emphasis added).[2]

3. Early federal recognition of tribes' retained sovereignty on tribal land is likewise reflected in the role of Indian agents, federal officers sent to Indian country to liaise with the tribes on behalf of the federal government. Rather than attempting to impose federal law on Indian land, these envoys sometimes assisted the tribes in administering tribal law over non-Indians. For example, early letters from Benjamin Hawkins, the Indian Agent in Creek Country and an early U.S. senator, reported that the Creeks "vested [him] unanimously with the [e]ntire government of white people among them." Letter from Benjamin Hawkins to James Jackson, Governor of Georgia, Aug. 14, 1800, *in* 1 *Letters, Journals and Writings of Benjamin Hawkins: 1796-1801*, at 344 (Grant ed., 1980). Hawkins also regarded the Creek's National Council, consisting of both a legislature and judiciary, as the representative government of a unified Creek Nation. Ethridge, *Creek Country: The Creek Indians and Their World* 107 (2003). The National Council attended to affairs such as land cessions and collective debt, and provided a forum for the

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[2] The United States' reliance on tribal police power continued well into the modern, post-treaty era. *See Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 92 (1890).

resolution of disputes between Indians and between Indian and non-Indian parties. *Id.* at 106-107.

Importantly, Hawkins's reports to his superiors made clear that he understood his authority to adjudicate disputes on Creek land to derive not from the federal government, but from the Creek Nation's sovereign power. Reporting on his work in an 1806 letter to President Thomas Jefferson, Hawkins wrote: "As the Creeks are an independent nation, I shall go [o]n to dispense justice among white and black people according to the authority vested in me by them as heretofore declared and has been customary for ten years ... until I am otherwise directed by our government or that Congress can legislate on the subject." Letter from Benjamin Hawkins to Thomas Jefferson, Sept. 13, 1806, *in* 2 *Letters, Journals and Writings of Benjamin Hawkins: 1802-1816*, at 507-509 (Grant ed., 1980); *see also* Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836*, at 61 (2010) (explaining that "Hawkins understood that he exercised delegated Creek jurisdiction, not federal authority" and outlining Hawkins's account of trials involving non-Indians in the Creek National Council).

B. The Removal Era

1. Indian tribes' formalized exercise of jurisdiction in part reflected their effort to demonstrate tribal "civilization" in the face of increasingly determined State efforts to dispossess tribes of their land. *See, e.g.*, Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* 51-53 (2009). Tribes like the Choctaws, Creeks, and Cherokees created legal systems modeled on the Anglo-American approach, with written constitutions and codes, and formal tribunals including a Supreme

Court. *See, e.g.*, Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* 53-72 (1975); Perdue, *Clan and Court: Another Look at the Early Cherokee Republic*, 24 Am. Indian Q. 562 (2000).

The constitutions of the "Five Civilized Tribes"—the Choctaw, Chickasaw, Seminole, Creek, and Cherokee Nations—closely tracked federal and state constitutions, containing, for example, bills of rights that largely reproduced federal and state provisions. Also like their federal and state counterparts, these constitutions frequently distinguished between criminal and civil jurisdiction. *See, e.g.*, Choctaw Const. art. 5, § 13 (1842) (distinguishing between appeals in "capital and criminal cases" and "all civil cases"); Cherokee Const. art. V, § 6 (1839) ("The Judges of the Supreme Court and of the Circuit Courts shall have complete criminal jurisdiction in such cases, and in such manner as may be pointed out, by law"); *id.* art. V, § 11 (providing accused persons the rights to confront witnesses, avoid self-incrimination, and secure a speedy trial by jury in "criminal prosecutions"); Chickasaw Const. art. 6, § 7 (1856) (granting circuit courts original jurisdiction over "all criminal cases" and original jurisdiction over "civil cases" not cognizable in the county courts).

2. Tribes' efforts to fend off State annexation of Indian land were largely in vain. At the insistence of the States, what began after the War of 1812 as negotiated, voluntary migration from eastern States to the western frontier became, in the 1830s under the Jackson administration, forced removal and resettlement of the tribes. *See generally Cohen's Handbook of Federal Indian Law* 41-51 (Newton et al. eds., 2012). Nonetheless, the United States continued to recognize tribes' right to self-government, including jurisdiction over certain non-Indians. In the House Report on the 1834

Western Territory Act, a bill that proposed to establish an Indian territory with a Native government, Congress explained:

> The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations. Officers, and persons in the service of the United States, and persons required to reside in Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States.... [But] [a]s to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

H.R. Rep. No. 23-474, at 18 (1834). The report thus recognized that tribes exercised territorial jurisdiction over "persons ... within [their] limits," including civil jurisdiction over non-Indians who voluntarily associated with the tribes. Indeed, even with respect to criminal jurisdiction, the report noted that where such authority had not been expressly removed, it was "rather of courtesy than of right that [the United States] undert[ook] to punish crimes committed in [Indian] territory by and against [U.S.] citizens." *Id.* at 13.[3]

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[3] Congress did not ultimately pass the Western Territory Act, but this Court has relied on the 1834 House Report as an indication of Congress's contemporaneous view of tribal jurisdiction. *See Oliphant*, 435 U.S. at 202 (noting that the bill did not contemplate tribes' exercising "criminal jurisdiction over United States officials and citizens traveling through the area").

Similarly, in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), this Court confirmed tribes' jurisdiction over non-Indians who voluntarily resided in tribal territory. The Court concluded in *M'Intosh* that Indians held a "title of occupancy" in their lands, subject to right of first refusal in the United States. *Id.* at 592. The tribes remained free to create property rights in non-Indians on tribal land through application of tribal law. But as the Court made clear, a non-Indian "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws." *Id.* at 593. "If [the tribe] annul[s] the grant," the Court explained, "we know of no tribunal which can revise and set aside the proceeding." *Id.*

3. The tribes themselves also acted on this right of self-government by establishing requirements for entry into and conduct on tribal land, and by enforcing those requirements against non-Indians.

For example, tribes frequently imposed licensing requirements for non-Indians seeking employment on tribal land. Beginning in 1836, for instance, the Choctaws required "white citizens of the United States" who "wish[ed] to remain in the Nation under employ of any [Tribe member]" to "procur[e] permission in writing from the Chief or United States Agent."[4] Later Choctaw laws also required non-Indian traders to submit a bond to the Choctaw court and required non-Indian workers to submit an application to the tribal

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[4] An Act requiring white men who wish to work in the Nation to obtain a written permit from the Chief or the Agent (1836), *reprinted in Constitution and Laws of the Choctaw Nation, Together with the Treaties of 1855, 1865, and 1866*, at 72 (1869).

court for review.[5] This permitting system persisted for decades. In 1890, the Report of the Commissioner of Indian Affairs explained that "[e]ach of the five [civilized] nations has its distinct permit system," requiring "[a]ll noncitizens who labor in the Territory" to pay "a permit tax varying from $2.60 to $12 per annum." *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 91 (1890).

Non-Indians were also required to secure permits before being allowed to marry tribal members. Providing that "jurisdiction of [its] civil laws should be exercised over all persons whatever," the Osage Nation, for example, required any U.S. citizen seeking to marry an Osage woman to "apply[] for a license" from the National Council, and upon receipt of such license, to pay the clerk of the Council "the sum of twenty dollars" and to swear "an oath to support the Constitution and abide by the laws of the Osage Nation." Osage Nation Const. art. IX, § 1, *reprinted in Treaties and Laws of the Osage Nation, as passed to November 26, 1890*, at 51, 90 (1895).

Other tribal regulations either prohibited non-Indians from engaging in particular activities or subjected certain activities to steep tariffs. The Choctaws, for instance, prohibited any "white man who ha[d] not

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[5] An Act regulating the granting of permits to trade, expose goods, wares or merchandise, for sale within the Choctaw Nation, and to reside within the same, and for other purposes (1867), *reprinted in Reports of Committees of the Senate of the United States for the First Session of the Forty-Ninth Congress 1885-'86*, at 595 (1886); *see also* An Act to amend An Act in relation to hiring White Men (1868), in *General Laws of the Legislature of the Chickasaw Nation (1867, 1868, 1869 & 1870)*, ch. XLIX, at 28 (1871) ("[T]he clerk shall receive from the white man, registered, one dollar, for which the clerk shall give his certificate to the white man so registered, which receipt shall be good evidence to the officers that said white man has been registered according to law.").

married a native of [the Choctaw] Nation" from ever "rais[ing] any stock within the limits of th[e] Nation." An act prohibiting white men to raise any stock in the Nation (1849), *reprinted in Constitution and Laws of the Choctaw Nation*, *supra* n.4, at 103. And the Muskokee tribe demanded that all non-Indian traders "pay a tax of one hundred dollars ($100) for each and every trading house." Muskokee Nation Civil Code § 10 (1867), *reprinted in Constitution and Civil and Criminal Code of the Muskokee Nation* 11 (1868).

These regulatory regimes reflect tribes' power, even at its nineteenth-century nadir, to enforce their laws against non-Indians on tribal land. *See Crabtree* v. *Madden*, 54 F. 426, 429 (8th Cir. 1893) (recognizing that where Creek tribe had "lawful authority to impose [a permit tax], it had equal power to prescribe the remedies and designate the officers to collect it"); *Hamilton* v. *United States*, 42 Ct. Cl. 282, 287 (1907) ("The claimant by applying for and accepting a license to trade with the Chickasaw Indians, and subsequently acquiring property within the limits of their reservation, subjected the same to the jurisdiction of their laws."); *cf. Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997) ("[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." (internal quotation marks and brackets omitted)).

C. The Post-Civil War Era

1. Reconstruction-era treaties between the United States and Indian tribes demonstrate the same respect for tribal jurisdiction on tribal land. An 1866 treaty with the Cherokees, for example, expressly confirmed Cherokee jurisdiction over civil disputes arising on tribal land and involving nonmembers. It provided

that "the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, *or where the cause of action shall arise in the Cherokee nation.*" Treaty with the Cherokee Indians art. 13, 14 Stat. 799, 803 (1866) (emphasis added).

Similarly, 1866 treaties with the Choctaws, Chickasaws, and Seminoles endorsed the establishment of a multi-nation Indian government for Indian territory with judicial power extending to "persons other than Indians." Treaty with the Choctaws and Chickasaws, art. 4, 14 Stat. 769, 772 (1866); Treaty with the Seminole Indians art. 7, 14 Stat. 755, 758-759 (1866). Both treaties recognized a "council, consisting of delegates elected by each nation" with "power to legislate upon all ... subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in the said territory, the arrest and extradition of criminals ... escaping from one tribe to another, the administration of justice between members of the several tribes of the said territory, and *persons other than Indians and members of said tribes or nations.*" *Id.* (emphasis added); *see also Hamilton*, 42 Ct. Cl. at 285-286 (recognizing that pursuant to 1866 Treaty with Choctaws and Chickasaws, Chickasaw Tribe had authority to enact eminent domain legislation taking non-Indian property within the reservation for tribal purposes).

2. In the 1870s and 1880s, an assimilationist ideology, which aimed to "civilize" Indians, began to dominate federal Indian policy. During that time, the Bureau of Indian Affairs helped to create a tribal law enforcement regime for certain reservations, including tribal police forces and judicial tribunals known as the Courts of Indian Offenses. In part, the BIA's purpose

was to integrate Indians into the dominant American culture. *See* Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* 107-110 (1966).

In practice, however, the courts—which were staffed by tribal members appointed by Indian agents—applied a blend of customary tribal law and federal regulation. *See, e.g.*, Institute for Government Research, *The Problem of Indian Administration* 769-772 (Merriam ed., 1928) (noting that proceedings were largely in Native languages and decisions relied "upon that subtle quality of the mind called common sense and upon an understanding of the current native ideas of property and justice"); Hagan, *supra*, at 42-44, 109-110, 118-120. Indeed, although the source of authority for the Court of Indian Offenses was debated, the Solicitor of the Interior concluded that the "better" view was that the courts "derive their authority from the tribe[s], rather than from Washington." *Powers of Indian Tribes*, 55 Interior Dec. 14, 64 (1934) (citation omitted); *see also id.* (noting that the BIA's role in establishing these courts "cannot be held to have impaired tribal authority in the field of law and order").[6] While most of the courts' docket consisted of criminal prosecutions of tribal members, Department of Interior regulations provided that these courts would also have jurisdiction over "civil suits where Indians are parties

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[6] Contrary to Dollar General's assertion (at 51 n.34), then, these courts were not merely federal instrumentalities that have no relevance to the jurisdiction of tribal courts. Indeed, in *Williams*, holding that exclusive jurisdiction over a collection action by a non-Indian who ran a store on the Navajo Reservation lay in the Navajo Courts of Indian Offenses, this Court reasoned that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs *and hence would infringe on the right of the Indians to govern themselves.*" 358 U.S. at 223 (emphasis added).

thereto," without conditioning civil jurisdiction over nonmembers on consent. Dep't of Interior, Office of Indian Affairs, *Rules Governing the Court of Indian Offenses* 7 (1883). The regulations further provided, "The civil jurisdiction of such court shall be the same as that of a Justice of the Peace in the State or Territory where such a court is located." *Id.*[7]

Throughout the nineteenth century, then, tribal police, councils, and courts asserted jurisdiction over non-Indians. Reflecting on this established practice, the Solicitor for the Department of the Interior explained in 1934 that "[s]uch jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." *Powers of Indian Tribes*, 55 Interior Dec. at 57. Indeed, the Solicitor noted, "attempts of the States to exercise jurisdiction over offenses between Indians, *or between Indians and whites, committed on an Indian reservation*, have been held invalid usurpation[s] of authority." *Id.* (emphasis added).

II. TRIBES HAVE NEVER BEEN DIVESTED OF CIVIL JURISDICTION OVER NON-INDIANS ON TRIBAL LAND

As the Solicitor explained in 1934, "[p]erhaps the most basic principle of all Indian law" is that the powers of an Indian tribe "are not, in general, delegated powers granted by express acts of Congress, but rather

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[7] These courts' jurisdiction over nonmembers was later limited to cases in which the nonmembers consented, but in 2008, recognizing that the consent requirement "unnecessarily diminished civil jurisdiction of [the Court of Indian Offenses]," the BIA reversed course, making clear that the limitation was not inherent in tribal jurisdiction. *See* 73 Fed. Reg. 39,857 (July 11, 2008). Today the Courts of Indian Offenses have jurisdiction over any civil controversy arising on tribal land in which "[t]he defendant is an Indian" or "*at least one party is an Indian.*" 25 C.F.R. § 11.116(a) (emphasis added).

inherent powers of a limited sovereignty which has never been extinguished." *Powers of Indian Tribes*, 55 Interior Dec. at 19; *see also Talton* v. *Mayes*, 163 U.S. 376, 383-385 (1896) (the Cherokees' "powers of local government" are not "federal powers arising from and created by the Constitution," but existed "prior to ... the Constitution"). "[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority," *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014), so "the proper inference from silence ... is that the sovereign power ... remains intact." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982). As discussed above, and as this Court has already recognized, that retained sovereignty has long included jurisdiction over non-Indians in civil disputes arising on tribal land, and stemming from consensual relationships between tribal members and nonmembers. *See supra* Part I; *see also, e.g.*, *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Strate*, 520 U.S. at 449, 453; *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Co.* v. *Crow Tribe of Indians*, 471 U.S. 845, 855-857 (1985); *Williams* v. *Lee*, 358 U.S. 217, 223 (1959).

Dollar General contends that the federal government has never expressly *granted* tribes the power to exercise civil jurisdiction over nonmembers, and points to a handful of treaty and statutory provisions that it claims reflect a recognition that tribes lack such authority. But the relevant question is whether the federal government has *withdrawn* such power, *see, e.g.*, *Bay Mills*, 134 S. Ct. at 2030, and the historical record shows that it has not.

1. Dollar General's reliance on the 1830 Treaty with the Choctaws is misplaced. To be sure, while otherwise guaranteeing the tribe broad powers of self-

government, the Treaty indicates that the Choctaw tribal courts had no *criminal* jurisdiction over non-Indians. *See Oliphant*, 435 U.S. at 197 (noting that "at the conclusion of th[e] treaty[, the Choctaws] '*express[ed] a wish* that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations'" (quoting Treaty of Dancing Rabbit Creek art. 4, 7 Stat. 333, 333-334 (1830) ("1830 Treaty") (emphasis added)).

But as the United States recognized, the 1830 Treaty did *not* limit the Choctaws' *civil* jurisdiction over nonmembers. Analyzing the 1830 Treaty in an 1855 opinion, Attorney General Cushing noted that "among the provisions ... are several of a very significant character having *exclusive* reference to the question of criminal jurisdiction." 7 Op. Att'y Gen. 174, 178 (1855) (emphasis added).[8] The United States, Cushing explained, had "retained the criminal jurisdiction as relates to citizens of the United States, and by act of Congress have provided for its exercise within the Choctaw nation; *but they did not reserve by treaty the*

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[8] Although the particular dispute at issue in this opinion concerned a white man who had married into the Choctaw tribe, Cushing's analysis was not, contrary to Dollar General's suggestion (at 27 n.26), so limited. *See* 7 Op. Att'y Gen. at 178-184; *National Farmers*, 471 U.S. at 854 (recognizing that Cushing's opinion distinguished "between civil and criminal jurisdiction" generally). Nor—and again contrary to Dollar General's characterization—did Cushing conclude that tribal courts lacked civil jurisdiction over non-Indians "trading with the Indians, or sojourning among them." *See* Pet. Br. 27 n.26 (quoting 7 Op. Att'y Gen at 186). Rather, Cushing merely clarified that his opinion was "not intended ... to impair the jurisdiction of Indian agents," a regulatory authority mandated by federal statute, "in regard to" such persons. 7 Op. Att'y Gen. at 186.

civil jurisdiction, nor have they assumed it by act of Congress." *Id.* at 184 (emphasis added). Indeed, he asked, "[c]an there be anything more explicit?" *Id.* at 180. Congress "has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters." *Id.*; *see also National Farmers*, 471 U.S. at 854 ("[T]here is no ... legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."); Cohen, *Handbook of Federal Indian Law* 254 (1982) ("Congress's failure to regulate civil jurisdiction in Indian country suggests both that there was no jurisdictional vacuum to fill and that Congress was less concerned with tribal civil, non-penal jurisdiction over non-Indians than with tribal jurisdiction over the personal liberty of non-Indians.").[9]

2. Indeed, the only authorities Dollar General cites that seemingly did withdraw tribal civil jurisdiction over non-Indians, two treaties from the 1850s, constituted the exception rather than the rule. *See* Pet. Br. 26-27 (citing Treaty with the Choctaws and Chickasaws art. 7, 11 Stat. 611, 612-613 (1855) ("1855 Treaty") (excepting from tribal jurisdiction "all white persons, with their property, who are not, by adoption or otherwise, members" of the tribe, without distinguishing between criminal and civil jurisdiction); Treaty with the

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[9] An 1834 opinion by Attorney General Butler likewise concluded that the Choctaws "ha[d] neither jurisdiction nor authority to pronounce and execute a sentence of death upon a slave of a white man residing among them." 2 Op. Att'y Gen. 693 (1834). Again, however, Cushing's later opinion noted that the 1834 case concerned only the *criminal* jurisdiction—not the civil jurisdiction—of the Choctaw nation. "Nothing in the premises of this [earlier] opinion, nor in its conclusion," Cushing recognized, speaks to the authority of tribal courts to adjudicate *civil* disputes involving non-Indians. 7 Op. Att'y Gen. at 184.

Creeks and Seminoles art. 15, 11 Stat. 699, 703-704 (1856) (same)).[10] In 1855 and 1856 alone—a time when both state and federal authorities sought to undermine tribal sovereignty in an effort to annex Indian land—the federal government negotiated twenty-two treaties with Indian tribes. Only the two that Dollar General cites include jurisdiction-stripping language.[11] Moreover, later treaties with the Choctaws, Chickasaws, and Seminoles—the same tribes subject to the earlier jurisdiction-stripping provisions—not only abandoned this language, but also affirmed the Tribes' power to exer-

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[10] Contrary to Dollar General's suggestion (at 26), the 1855 Treaty was not a treaty with the Mississippi Choctaw, but with the Oklahoma Choctaw, a distinct group. Although both nations trace their origin to the pre-removal Choctaws, they separated after much of the Tribe was forcibly relocated to the Indian Territory in Oklahoma. After removal, the two nations maintained separate governments and separate relations with the United States. *See United States* v. *John*, 437 U.S. 634, 640-647 (1978); Osburn, *Choctaw Resurgence in Mississippi: Race, Class, and Nation Building in the Jim Crow South, 1830-1977*, at 10-11, 206-208 (2014).

[11] *See* Treaty with the Willamette Indians, 10 Stat. 1143 (1855); Treaty with the Dwámish Indians, 12 Stat. 927 (1855); Treaty with the S'Klallams, 12 Stat. 933 (1855); Treaty with the Wyandotts, 10 Stat. 1159 (1855); Treaty with the Makah Tribe, 12 Stat. 939 (1855); Treaty with the Chippewas, 10 Stat. 1165 (1855); Treaty with the Winnebagoes, 10 Stat. 1172 (1855); Treaty with the Walla-Wallas, 12 Stat. 945 (1855); Treaty with the Yakamas, 12 Stat. 951 (1855); Treaty with the Nez Percés, 12 Stat. 957 (1855); Treaty with Indians in Middle Oregon, 12 Stat. 963 (1855); Treaty with the Qui-nai-elts, 12 Stat. 971 (1856); Treaty with the Flatheads, 12 Stat. 975 (1855); Treaty with the Ottowas and Chippewas, 11 Stat. 621 (1855); Treaty with the Chippewas of Sault Ste. Marie, 11 Stat. 631 (1855); Treaty with the Chippewas, 11 Stat. 633 (1855); Treaty with the Blackfoot Indians, 11 Stat. 657 (1855); Treaty with the Molels, 12 Stat. 981 (1855); Treaty with the Stockbridges and Munsees, 11 Stat. 663 (1856); Treaty with the Menomonees, 11 Stat. 679 (1856).

cise jurisdiction over non-Indians. The 1866 Treaty with the Choctaws and Chickasaws, as well as the 1866 Treaty with the Seminoles, expressly secured to the Indian Council the power to administer justice "between members of the several tribes ... *and persons other than Indians and members of said tribes or nations*." Treaty with the Choctaws and Chickasaws art. 8, 14 Stat. 769, 772 (1866) (emphasis added); Treaty with the Seminoles art. 7, 14 Stat. 755, 758-759 (1866).[12]

3. Nor does legislation providing federal compensation for depredations by or against Indians demonstrate any withdrawal of tribes' civil jurisdiction over non-Indians. *See* Pet. Br. 32. The Indian depredation claims system grew out of the Trade and Intercourse Acts, which, beginning in 1790, sought to regulate trade and maintain peace with the Indians. *See* Act of July 20, 1790, 1 Stat. 137. Those Acts sought to prevent in-

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[12] It is worth noting that the two treaties from 1855 and 1856 that temporarily withdrew tribal jurisdiction over "white persons" did explicitly recognize tribes' "full jurisdiction" over all "members" of the Choctaw and Creek nations. 1855 Treaty art. 7, 11 Stat. at 612-613; Treaty with the Creeks art. 15, 11 Stat. at 703-704. Under nineteenth-century federal law, many of these "members" were individuals who would today be classified as non-Indians, and who would be ineligible for tribal membership, such as Euro- and African-Americans without any Native ancestry who had nonetheless affiliated with the tribe. *Compare* 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe") *with Lucas* v. *United States*, 163 U.S. 612, 616 (1896) (non-Indians "found within the Indian Territory, associating with the Indians" are presumptively considered "member[s] of the tribe" for jurisdictional purposes). They were, as this Court stated, "Indians in a jurisdictional sense" only. *Lucas*, 163 U.S. at 615. And tribes not only possessed jurisdiction over these ethnic non-Indians; they possessed *exclusive* jurisdiction, as evidenced in later federal statutes. *See* Act of May 20, 1890, § 30, 26 Stat. 90, 94.

stances of private revenge between Indians and non-Indians residing along the borders established in the wake of the Indian wars. To this end, the federal government pledged to compensate victims—whether Indian or white—for losses and harms caused by the other, but only where the injured party had declined to take justice into his own hands. Compensation was expressly unavailable in the event that a victim had "sought private revenge, or attempted to obtain satisfaction by any force or violence." Act of May 19, 1796, §§ 4, 14, 1 Stat. 469, 470, 472-473.

Similar indemnification provisions, pursuant to which the federal government was to indemnify Indians for certain harms caused by U.S. citizens, were written into treaties between the United States and several tribes in the mid-nineteenth century. *See* Pet. Br. 28 (citing Treaty with the Choctaws and Chickasaws art. 14, 11 Stat. 611, 614 (1855); Treaty with the Creeks and Seminoles art. 18, 11 Stat. at 704). Indians were indemnified "according to the same rules upon which white persons [were] entitled to indemnity for injuries or aggressions upon them committed by Indians." *Id.*

The Indian depredation claims system thus began as a pragmatic, administrative response to frontier violence. *See generally* Skogen, *Indian Depredation Claims, 1796-1920* (1996). It did not displace judicial resolution of disputes. Indeed, even though the federal government provided compensation for wrongs by and against Indians, state courts expressly retained jurisdiction when those wrongs were committed outside Indian country. *See* Act of May 19, 1796, § 14, 1 Stat. at 472-473; Act of June 30, 1834, § 17, 4 Stat. 729, 731-732. Nothing in the historical record indicates that the depredation claims provisions displaced tribal courts' jurisdiction over civil wrongs within Indian country.

Moreover, as explained by the Court of Claims—the court responsible for adjudicating depredation claims against the United States beginning in 1891, *see* Act of March 3, 1891, § 1, 26 Stat. 851, 851—the depredation system was limited to "wrongs having the element of a depredation," meaning an act of "[f]orce, trespass, violence, [or] a physical taking by force ... or destruction." *Ayres* v. *United States*, 35 Ct. Cl. 26, 27, 28 (1899). In other words, the system "excluded from [the indemnification] policy all liability growing out of what might be called commercial or business relations between the citizen and the Indian." *Id.* at 29. Although a petitioner "may be guilty of a tortious act," the Court of Claims thus explained, such an act "is not within the purview of the Indian Depredation Act." *Id.* at 26. The Indian depredation claims system therefore had no bearing on civil torts stemming from consensual commercial relationships between tribes and non-Indians—like that at issue here.

4. Other statutes on which Dollar General relies conferred jurisdiction of civil disputes involving non-members on federal courts, but they did not grant the federal courts *exclusive* jurisdiction, and thus did nothing to strip tribal courts of the power they possessed. The Act of May 2, 1890, for example, simply granted federal courts "jurisdiction" over disputes arising in the newly created "Territory of Oklahoma," while reserving "exclusive jurisdiction" to the tribes over "all civil and criminal cases ... in which members of the nation ... [are] the only parties." *Id.* §§ 29, 30, 26 Stat. 81, 93-94; *see also Crabtree*, 54 F. at 429 (recognizing that neither this act, nor other applicable treaty or statutory provisions, stripped the Creek Tribe of jurisdiction over non-Indians on tribal land).

Similarly, nothing in Public Law 280 suggests that Congress divested tribal courts of civil jurisdiction. Although the law permits States to assume concurrent jurisdiction over civil disputes arising on tribal land, since 1968 Congress has expressly conditioned that assumption of jurisdiction on tribal consent. *See McClanahan* v. *Ariz. State Tax Comm'n*, 411 U.S. 164, 177 (1973) ("[T]he Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country.'" (quoting 25 U.S.C. § 1322(a), which instructs that States may act only "with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption")); *see also* Cohen 2012, *supra*, at 555 ("The nearly unanimous view ... is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched," merely making tribal and state jurisdiction concurrent). If anything, then, Public Law 280 reflects Congress's "policy of deference to tribal courts." *Iowa Mut.*, 480 U.S. at 17-18.

5. Finally, the Indian Civil Rights Act is no help to Dollar General. ICRA is "silen[t] regarding tribal courts' civil jurisdiction" (Pet. Br. 35), and so cannot be read to curtail such courts' civil jurisdiction, *see Powers of Indian Tribes*, 55 Interior Dec. at 19 ("The statutes of Congress ... must be examined to determine the *limitations* of tribal sovereignty rather than to determine its sources or its positive content." (emphasis added)). In any event, Dollar General misconstrues ICRA's reach and thus Congress's view of tribal court jurisdiction more generally.

ICRA does not establish protections in tribal courts solely for "tribes' *own members*." Pet. Br. 34 (emphasis in original). Rather, the guarantees of ICRA are worded generally to apply to all "people" or "any

person." 25 U.S.C. §§ 1302-1303. Although an early version of ICRA extended its guarantees only to "American Indians," the legislation was modified to extend its protections to "all persons who may be subject to the jurisdiction of tribal governments, *whether Indians or non-Indians.*" *Summary Report on Constitutional Rights of the American Indian: Hearings and Investigations Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 10 (1966) (emphasis added); *see also* Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1158-1159 & n.132 (1990) (reviewing legislative history of ICRA); Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 602 n.239 (1972) (same). In other words, far from reflecting "Congress's understanding that tribal courts generally lacked jurisdiction over nonmembers" (Pet. Br. 35), ICRA confirms the well-established understanding that tribal courts retain jurisdiction over nonmembers in civil controversies that arise on tribal land. That understanding is strongly supported by the historical record, and this Court should reaffirm it here.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

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DOLLAR GENERAL CORPORATION, *et al.*,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE STATES OF MISSISSIPPI, COLORADO, NEW MEXICO, NORTH DAKOTA, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Indian tribes generally lack civil authority over the conduct of nonmembers, subject to two important exceptions set forth by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981). The first of those exceptions authorizes a tribe to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members . . . ." *Id.* at 565. This case presents a fundamental question about that exception: does it *ever* provide a basis for tribal courts to adjudicate tort claims against nonmembers?

This brief is filed by the States of Mississippi, Colorado, New Mexico, North Dakota, Oregon, and Washington.[1] Each has a clear interest in the resolution of the question presented because each is home to one or more federally recognized Indian tribes with whom it enjoys a strong and cooperative relationship.

The State of Mississippi is home to one federally recognized tribe, Respondent Mississippi Band of Choctaw Indians (the Tribe). The Tribe's citizens (over 10,000) are also Mississippi citizens, *see* 8 U.S.C. § 1401(b), and the State has a direct interest in their rights and welfare. The State also has a direct interest in respecting the ability of the Tribe to regulate the activity of those voluntarily doing business on Choctaw Reservation land. In Mississippi's view, reversing the decision below would not only constitute an unwarranted

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

assault on the Choctaw tribal court system, but also cast doubt on the inherent rights of all interdependent sovereigns like the State of Mississippi itself.

The State of Colorado is home to two federally recognized tribes, both of which have a tribal court system. *See Federal and State Recognized Tribes*, Nat'l Conf. of St. Legs., www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#co ("Federally Recognized Tribes").[2] Colorado and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, C.R.S. §§ 24-44-103(1)(a), (2)(e) (establishing Colorado Commission of Indian Affairs, whose duties and powers include coordinating intergovernmental dealings between tribes and the State and "address[ing] the needs of tribal governments and Indian peoples of [Colorado].").

The State of New Mexico is home to 23 federally recognized tribes and 22 tribal court systems. *See* Federally Recognized Tribes.[3] New Mexico and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, N.M. Stat. Ann. § 11-18-3 (encouraging state-tribal collaboration and communication).

The State of North Dakota is home to five federally recognized tribes, each of which has a tribal court

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[2] *See also Tribal Court*, Southern Ute Indian Tribe, http://www.southernute-nsn.gov/tribal-court/; *Tribal Law Gateway: Ute Mountain Tribe of the Ute Mountain Reservation*, N.I.L.L., http://www.narf.org/nill/tribes/ute_mtn_ute.html.

[3] *See also N.M. Tribal Courts and Judge's Directory*, N.M. Tribal-State Jud. Consortium (2014-2015), https://tribalstate.nmcourts.gov/index.php/component/docman/doc_download/Tribal%20Judges%20Directory%202014-2015.pdf (identifying New Mexico tribal courts).

system. *See Tribal Nations*, N.D. Indian Affairs Comm'n, http://www.nd.gov/indianaffairs/?id=18.[4] North Dakota and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, *Judicial*, N.D. Indian Affairs Comm'n, http://www.nd.gov/indianaffairs/?id=43.

The State of Oregon is home to nine federally recognized tribes, each of which has a tribal court system. *See Oregon's Indian Tribes*, Or. Blue Book, http://bluebook.state.or.us/national/tribal/tribal.htm. Oregon and its tribes have a relationship of mutual respect and cooperation. *See, e.g.*, O.R.S. § 182.164(1)(c)-(d) (encouraging state-tribal collaboration and communication).[5]

The State of Washington is home to 29 federally recognized tribes and 29 tribal court systems. *Washington State Tribal Directory*, Governor's Office of Indian Affairs, http://www.goia.wa.gov/Tribal-Directory/TribalDirectory20151005.pdf. Washington and its tribes have a relationship of mutual respect and cooperation. *See* Wash. Civ. R. 82.5 (addressing tribal jurisdiction and providing for enforcement of tribal court orders).

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[4] *See also North Dakota Tribal Child Welfare Services Directory*, Native American Training Institute, http://www.nativeinstitute.org/North%20Dakota%20Tribal%20Child%20Welfare%20Services%20Directory.pdf (identifying North Dakota tribal court systems).

[5] *See also* Executive Order No. EO-96-30, State/Tribal Government-to-Government Relations (Mar. 22, 1996), *available at* http://www.oregon.gov/LCD/docs/govtogov/eo96-30.pdf (requiring Cabinet level department heads to adopt policies and procedures in furtherance of the government-to-government relationship between the State and federally recognized tribes in Oregon).

According to Petitioners, tribal courts are universally prohibited from exercising jurisdiction over nonmembers in civil tort suits, no matter how strong the consensual relationship between that nonmember and the tribe and no matter how clear the nexus between that consensual relationship and the alleged tort.

As explained herein, the amici states respectfully disagree. There is no basis in law or logic to categorically limit a tribe's authority merely because "the mode of regulation is tort law." Cert. Reply Br. 4 n.5.

STATEMENT OF THE CASE

1. Dolgencorp, Inc. (Petitioner) operates a Dollar General store under a business license issued by the Tribe. J.A. 28. The store is located on Reservation land, and Dolgencorp leased the premises from a tribal entity. J.A. 28. In that lease, Dolgencorp directly acknowledges that it is operating on "land held in Trust by the United States of America for the [Tribe]." J.A. 48 (XXIX).

The lease requires Dolgencorp to "comply with all codes and requirements of all tribal and federal laws and regulations, now in force, or which may hereafter be in force, which are applicable and pertain to [Dolgencorp's] specific use of the demised premises." J.A. 45 (XXVIII). It also expressly provides for jurisdiction in tribal courts and subjects the agreement to tribal laws, including "the Choctaw Tribal Tort Claims Act":

> This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi . . . . Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians.

> This agreement and any related documents is [sic] subject to the Choctaw Tribal Tort Claims Act.

J.A. 47-48 (XXVII).

In spring 2003, Dale Townsend, the store's non-Indian manager, agreed that Dolgencorp's store would participate in the "Youth Opportunity Program," J.A. 66 (deposition testimony), a formal program that places young tribal members in short-term positions (like an internship) with local businesses, J.A. 51.

2. John Doe (Respondent) is a citizen of Mississippi and a member of the Tribe. Pet. App. 3. In summer 2003, when Doe was 13, he worked at the store through the Youth Opportunity Program. Townsend was Doe's supervisor. J.A. 12 (Tribal Ct. Compl. ¶ II); *see* J.A. 60 (describing Townsend's responsibilities as a supervisor participating in the Youth Opportunity Program).

According to Doe, Townsend sexually molested him at the store in July 2003. Doe alleges that Townsend made multiple uninvited sexual advances, offered him money, grabbed him "in his crotch area" until Doe "escaped from his grasp," and continued to make sexually offensive remarks. J.A. 13 (Tribal Ct. Compl. ¶¶ IV-V). Doe claims to have suffered severe and prolonged trauma as a result of Townsend's attacks. J.A. 14 (Tribal Ct. Compl. ¶ VII).

In September 2003, the Choctaw Tribal Court entered an order (with Townsend's consent) excluding Townsend from the Reservation. J.A. 24.

3. In January 2005, Doe filed a complaint in the Civil Division of the Choctaw Tribal Court seeking compensatory and punitive damages from Townsend and Dolgencorp. J.A. 11-15. The complaint asserts claims

against Dolgencorp for vicarious liability and negligence in hiring, training, or supervising Townsend. J.A. 14. The complaint specifically alleges that Dolgencorp was on notice "of Townsend's propensity to harm children." J.A. 13 (Tribal Ct. Compl. ¶ IV).

The tribal court denied Petitioners' motion to dismiss for lack of jurisdiction. J.A. 22. On interlocutory appeal, the Choctaw Supreme Court affirmed, holding that the tribal court had jurisdiction under the exceptions articulated in *Montana* v. *United States*, 450 U.S. 544 (1981). Pet. App. 82-90.

Invoking *Montana*'s first exception, the Choctaw Supreme Court held that defendants had engaged in three qualifying "consensual relationships"—the lease, the business license, and the agreement to participate in the Youth Opportunity Program. Pet. App. 85-87. The court also identified a "considerable nexus between the alleged tort and [Dolgencorp's] commercial lease" because the perpetrator managed the leased premises and the victim was a "[t]ribal minor placed at the store by the Tribe to receive job training." Pet. App. 85-87. The court determined this was sufficient to support jurisdiction in tribal court.

4. Petitioners then sought injunctive relief in the United States District Court for the Southern District of Mississippi. J.A. 19-27. Following discovery, the district court granted Respondents' motion for summary judgment on the first *Montana* exception. Pet. App. 45-54. The court found that Petitioners' participation in the Youth Opportunity Program constituted a consensual relationship, and that Petitioners had "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship." Pet. App. 45-46. The court also concluded that Doe's claims "arise

directly from this consensual relationship" and therefore provide "a sufficient nexus between the consensual relationship and exertion of tribal authority." Pet. App. 45-46 (citing *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001); *Montana*, 450 U.S. at 566).

5. A split panel of the Fifth Circuit affirmed. Pet. App. 1-2. Like the three courts before it, the Fifth Circuit identified an "obvious" nexus between Petitioners' consensual participation in the Youth Opportunity Program and Doe's tort claims.

According to the court of appeals, the tribal suit regulates "the safety of the child's workplace," and it is irrelevant that "the regulation takes the form of a tort duty that may be vindicated . . . in tribal court." Pet. App. 13. Dolgencorp could anticipate both having "to answer in tribal court for harm caused to the child in the course of his employment" and that a store manager sexually molesting an intern "would be actionable under Choctaw law." Pet. App. 13, 14 n.4. *See also* J.A. 87 (Dolgencorp's policy on sexual harassment).

After a divided court of appeals denied rehearing en banc, Pet. App. 93, Petitioners sought further review by this Court of the following threshold question: "[w]hether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulation the conduct of nonmembers who enter into consensual relationships?" According to Petitioners, the answer is an unqualified "no." *See, e.g.*, Pet. 18 ("Absent congressional authorization, tribal courts have no jurisdiction to adjudicate tort claims against nonmembers") (capitalization removed).

SUMMARY OF ARGUMENT

Indian tribes generally lack civil authority over the conduct of nonmembers. But that rule is subject to two important exceptions set forth by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981). The first (the Consensual Relationship Exception) authorizes a tribe to "regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565 (emphasis added).[6]

In this case, Petitioners urge the Court to hold that the Consensual Relationship Exception is categorically inapplicable to civil tort claims. According to Petitioners, *Montana* did not contemplate tribal courts *ever* participating in the regulation of nonmember conduct through the adjudication of tort claims—even when a nonmember purposefully engages in commercial activity with the tribe or its members and an ensuing tort arises directly out of that relationship. Pet. Br. 49.

The amici states respectfully disagree. There is no basis in law or logic to categorically limit a tribe's authority merely because "the mode of regulation is tort law." Cert. Reply Br. 4 n.5.

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[6] "[O]ther means" includes litigation. *See, e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 656 (2001) ("*Montana* governed tribal assertions of [civil] adjudicatory authority" over non-member defendants) (citing *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997)). *See also Montana*, 450 U.S. at 465-66 (citing a case involving tribal court jurisdiction over a contract dispute in explaining the Consensual Relationship Exception).

ARGUMENT

The ability of tribal courts to resolve disputes is an essential attribute of tribal sovereignty. While the amici states agree that there are important limits to the jurisdictional reach of those courts, there is no basis for Petitioners' categorical rule: that, under *Montana*, tribal courts may *never* adjudicate civil tort suits against nonmembers, no matter how closely the nonmember voluntarily associated with the tribe or the clarity of the nexus between the consensual relationship and the alleged tort. As explained herein, Petitioners' narrow reading of the Consensual Relationship Exception would unnecessarily compromise the relationship of mutual respect between States and tribes as interdependent sovereigns.

I. The Consensual Relationship Exception of *Montana* Is Essential to Tribal Sovereignty.

The United States, the fifty states, and the 567 federally recognized Native American tribes are each interdependent sovereigns with natural rights on matters of self-government. *See, e.g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978) (explaining that Native American tribes are "distinct independent political communities, retaining their original natural rights in matters of local self-government").

Judicial autonomy is one such natural right. And it is of particular importance in the tribal context. Congress has acted deliberately to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government," *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974), and the development of justice systems has been recognized as essential to "eras[ing] old attitudes of paternalism," Lyndon Johnson, Special Message to

the Congress on the Problems of the American Indian, 1 Pub. Papers 335 (Mar. 6, 1968).

This Court's decisions reflect that reality. It has, for example, held that federal courts lack jurisdiction to hear claims under the Indian Civil Rights Act partly because tribes are independent sovereigns. *See Santa Clara Pueblo*, 436 U.S. at 55. It has required nonmembers to exhaust tribal remedies, in light of Congress' "policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). And it has specifically recognized that the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16-17 (1987).

To be sure: tribes—including their judicial systems—generally lack civil authority over the conduct of nonmembers. *See, e.g.*, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (noting that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . .") (quoting *Montana*, 450 U.S. at 565, for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

But this Court in *Montana* set forth two important exceptions. The first, the Consensual Relationship Exception, authorizes a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565.

The ability of tribes to regulate the conduct of nonmembers who enter into a consensual relationship with a tribe or its members is essential to tribal sovereignty. In the words of this Court:

> *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, 101 S.Ct. 1245, allowing these to be regulated to the extent necessary "to protect tribal self government [and] to control internal relations," *id.*, at 564, 101 S.Ct. 1245. See *Big Horn Cty. Elec. Cooperative, Inc.* v. *Adams*, 219 F. 3d 944, 951 (C.A.9 2000) ("*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers" (internal quotations omitted; emphasis added)).

Plains Commerce Bank, 554 U.S. at 332.

As this Court has emphasized, the trigger for the Consensual Relationship Exception is the fact that "non-Indian activities on the reservation . . . had a discernable effect on the tribe or its members." *Ibid.* (further noting that "a Tribal Court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation" was the first of four cases cited "in explanation of *Montana's* first exception").

II. As This Case Reaches the Court, There Is No Dispute That the Alleged Torts Arose Directly from a Consensual Relationship.

As amici understand it, the following facts are not in dispute: Petitioners voluntarily established a presence on Reservation land and expressly agreed to conduct their business in accordance with the Tribe's rules, *supra* pp. 4-5. The torts alleged by Respondent (a young Tribe member) arose directly out of the business that Petitioner agreed to conduct on Reservation land in accordance with the Tribe's rules, *supra* p. 5. *See also* Br. in Opp. 14 (noting that, at oral argument before the Choctaw Supreme Court, Dolgencorp conceded that it employed Doe at its store through the Youth Opportunity Program and argued that it could not be liable in tort "due to the worker's comp. exclusive remedy"—an argument underscoring the "consensual relationship" between Petitioners and Doe).

Presented with those facts, four courts independently concluded that this case triggers the first *Montana* exception for relationships arising from "commercial dealings, contracts, leases, or other arrangements." *See* Pet. App. 3 (Choc. Tribal Ct.); Pet. App. 75-91 (Choc. Sup. Ct.); Pet. App. 39-54 (S.D. Miss.); Pet. App. 1-36 (5th Cir.). *Cf. Walls* v. *North Mississippi Medical Center & U.S. Fidelity & Guar. Co.*, 568 So.2d 712, 716 (Miss. 1990) (holding that relationship between a student intern and host institution was a "consensual relationship").[7]

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[7] If tribes have the authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 565, then it is hardly surprising that the lower courts

In this Court, Petitioners do not challenge the lower courts' determination of a qualifying consensual relationship or its connection to the torts alleged. *See, e.g.*, Gov't Cert. Br. 8 ("Rather than repeat the arguments they advanced in the court of appeals, petitioners now contend that tribal courts universally 'lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress.'") (quoting Pet. 18).

III. The Categorical Rule Urged by Petitioners Is Unnecessary to Address Legitimate Concerns Regarding Fairness and Consent.

Petitioners urge this Court to adopt a rule uniformly excluding civil tort suits from tribal authority. *See, e.g.*, Pet. 18 ("Absent congressional authorization, tribal courts have no jurisdiction to adjudicate tort claims against nonmembers") (capitalization removed).

Such a categorical rule would disrupt the longstanding relationship of mutual respect and cooperation between the amici states and the tribes within their borders. *Cf. Darr* v. *Burford*, 339 U.S. 200, 204 (1950) (noting, in the federalism context, that "it would be unseemly in our dual system of government" for federal courts to proceed before "the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass upon the matter").

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here all determined that the Choctaw tribal courts (as a branch of tribal self-government) are the appropriate forum for adjudication of this dispute. As the Fifth Circuit expressed the point: it is unremarkable to find it "within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees." Pet. App. 13.

Petitioners argue that some tribal courts are not fit to adjudicate tort suits against nonmembers. *See generally* Pet. Br. 2-9. And they argue that it would be especially unfair to hale nonmembers into such courts based on isolated or incidental contacts with the tribe. *See* Pet. Br. 53-54. But, as explained next, a categorical rule is unnecessary to protect nonmembers against unfair, *infra* pp. 14-16, or unsuspecting, *infra* pp. 16-19, exercises of tribal authority.

A. Concerns About *Some* Tribal Courts Do Not Warrant Removing *All* Tort Disputes From *Montana*'s Exception.

Amici have close relationships with tribal courts. Broadly speaking, those courts provide important remedies to tribal members while also providing meaningful safeguards for nontribal parties. Amici respect these courts as a legitimate and wholly sufficient forum for sovereign tribes to resolve matters concerning the tribe and to regulate conduct within their borders.

Mississippi's experiences with the tribal courts of Respondent are illustrative. Mississippi's longstanding governmental ties to the Tribe and its membership include extensive experience with the Choctaw tribal courts. Although many tribal court disputes concern only Mississippi citizens who are also Tribe members, a significant minority of cases involve nonmember citizens.[8] And, as with its own courts, Mississippi

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[8] *See, e.g.*, *Williams-Willis* v. *Carmel Fin. Corp.*, 139 F. Supp. 2d 773 (S.D. Miss. 2001) (civil jurisdiction over action involving claim against nonmember arising from nonmember's alleged tortious activities on reservation lands presumptively lies in tribal courts, which must be given first opportunity to rule on jurisdiction); *Bank One, N.A.* v. *Lewis*, 144 F. Supp. 2d 640 (S.D. Miss. 2001) (credit card issuer required to exhaust tribal remedies).

carefully monitors the workings of all tribunals that regularly adjudicate the legal rights of its citizens.

Based on its experience, Mississippi has confidence in the Choctaw courts. The Choctaw courts' institutional framework with regard to such procedural protections as judges' qualifications,[9] ethical and procedural rules,[10] and limitations on jurisdiction[11] is sound, and they have consistently demonstrated the ability to fairly and competently adjudicate claims before them.[12]

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[9] Among many qualifications, all judges in the Civil Division of the Choctaw Tribal Court must be attorneys licensed to practice law in Mississippi. Choctaw Tribal Code § 1-3-3. All three judges on the Choctaw Supreme Court must be graduates of accredited law schools and have served at least two years as a judge or ten years as a tribal judge; the Chief Justice must have served at least three years as a judge, among other qualifications. *Id.* §§ 1-3-3, 1-3-4.

[10] Tribal judges are subject to comprehensive ethics provisions modeled on the American Bar Association's Model Code of Judicial Conduct, Choctaw Tribal Code § 1-5-7, and court clerks and other judicial-support personnel are subject to a separate code of ethics, *id.* at tit. I, ch. 8. The Choctaw Tribal Court Rules of Civil Procedure and Mississippi Band of Choctaw Indians' Rules Evidence mirror the corresponding Mississippi rules. *See id.* at tit. VI, chs. 1, 3.

[11] The Choctaw Tribal Code carefully limits the exercise of tribal jurisdiction over nonmembers to "civil cases in which at least the party presence, business dealings, or contracts, or other actions or failures to act, or other significant minimum contacts on or with the reservation" have given rise to civil obligations to Tribe members. Choctaw Tribal Code § 1-2-1.

[12] The Mississippi legislature has responded accordingly. *See, e.g.*, Miss. Code Ann. § 41-57-23(2)(a) (recognizing that tribal court has the same authority as chancery court to make changes to birth certificates and requiring State Board of Health to comply with tribal court decrees under this section).

Amici states are aware that there can be significant variation in the practices and experience of tribal court systems, which may cause concern for nonmembers. But as the United States and Respondents have already discussed in detail, there are adequate institutional protections both outside of and within individual tribal court systems to safeguard the rights of non-members. *See* Resp. Br. 47-49; Gov't Cert. Br. 19-20. Indeed, the Consensual Relationship Exception itself is a protection against potential overreach by a tribal court with regard to regulation of nonmember conduct, *infra* pp. 16-19.

Amici states believe that legitimate concerns about *some* tribal courts' ability to fairly and competently adjudicate tort claims involving nonmembers do not warrant stripping *all* tribal courts of their authority to adjudicate such claims. Amici have no reason to believe that tribal courts are categorically unfit to adjudicate civil tort disputes involving non-members, especially where those nonmembers have agreed to subject themselves to tribal jurisdiction. And Petitioners' contrary view is out of step with the amici states' broad experience with tribal justice systems—and their abiding respect for tribes' right to self-govern.

B. Concerns About Insufficient Consent Are Not Implicated Here.

Finally, Petitioners argue that it is distinctly unfair to force unsuspecting nonmembers to defend tort claims in tribal courts where the "consensual relationship" with the tribe is remote or tenuous. *See, e.g.*, Pet. Br. 53 ("[W]hen jurisdiction is founded on the tribal membership of an employee, or the tribal identification of a corporation, it may be difficult or impossible for a

business to know whether any particular transaction or course of conduct is governed by tribal law.").[13]

That concern is echoed by six amici states in support of Petitioners. *See, e.g.*, Br. for Okla. et al. 2 (describing a motorist who chooses a travel stop that "indiscernibl[y]" operates as a tribal business on a "tiny, isolated parcel of Indian land").

Amici states are sympathetic to those concerns. *See, e.g.*, Br. for States as Amici Curiae Supporting Petitioner, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (No. 07-411), 2008 WL 503594, at *19-20 (expressing view of North Dakota and Washington, among other amici, that requisite "consensual relationship" under first *Montana* exception cannot be inferred solely from dealings with corporation majority-owned by tribal members); Br. for States as Amici Curiae Supporting Petitioner, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001) (No. 00-454), 2001 WL 41036, at *16 (expressing view of Colorado, Mississippi, and North Dakota, among other amici, that nonmembers do not consent to tribal taxation merely by entering reservation under first *Montana* exception); Br. for States as Amici Curiae Supporting Respondents, *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872), 1996 WL 709324, at *22-24 (expressing view of Colorado, Mississippi, and Washington, among other amici, that nonmembers did not consent to tribal jurisdiction over automobile accident under first *Montana* exception by driving on highway within reservation).

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[13] *See also* Pet. Br. 54 ("While in some cases, a defendant may conduct business on a clearly marked reservation, in other cases a defendant may simply be passing through land difficult to identify as tribal.").

But those concerns are simply not implicated here. Unlike the hypotheticals posed by Petitioners and their amici, or the circumstances that have troubled Colorado, Mississippi, North Dakota, and Washington in the past, there was no accidental or unsuspecting contact between Petitioners and the Tribe in this case. No one stumbled onto tribal land or into a tribal business. And no one was haled into tribal court on the happenstance that a counterparty turned out to be a tribal member.

On the contrary, amici states understand Dolgencorp to be a sophisticated party that knowingly established a for-profit commercial relationship with the Tribe. According to its own papers, Dolgencorp voluntarily entered into multiple legal agreements with the Tribe, including a business license, a separate lease agreement, and yet another agreement to participate in the Youth Opportunity Program. And it was fully informed before entering those relationships, including (in the case of its lease) by an express agreement that tribal law would govern and "jurisdiction" would vest in the tribal court. J.A. 47-48 (Provision XXVII).

As the United States has noted, "Petitioners do not dispute that they had a consensual relationship with the Tribe." Gov't Cert. Br. 12. "Rather than repeat the arguments they advanced in the court of appeals, petitioners now contend (Pet. 18) that tribal courts universally 'lack jurisdiction to adjudicate private tort claims against nonmembers absent authorization from Congress.'" Gov't Cert. Br. 8.

Amici do not believe that this case presents a suitable vehicle for grappling with the outer boundaries of the "consensual relationship" test. Petitioners have not pressed the issue, and the lower courts have determined

that this case falls squarely within the heartland of *Montana*'s Consensual Relationship Exception. Exactly what suffices to show a "consensual relationship" under that exception is too important to be decided in this case, where the nonmember's tribal interaction is repeated, express, and deliberate. Amici states respectfully ask this Court to leave those critical questions about the boundaries of tribal jurisdiction to a future case, in which they can be meaningfully addressed by all stakeholders.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Congress of American Indians was established in 1944 and is the oldest and largest American Indian organization in the United States, representing more than 250 Indian Tribes and Alaskan Native villages.

Amicus United South and Eastern Tribes, Inc. is an intertribal organization comprised of 26 federally recognized Indian Tribes in the southern and eastern United States.

Amicus Inter Tribal Association of Arizona is an intertribal organization comprised of 21 federally recognized Indian Tribes with lands located in Arizona, California, New Mexico, and Nevada.

Amicus California Association of Tribal Governments is the tribally chartered, statewide, intertribal, non-profit association of 32 federally recognized Indian Tribes in the state of California.

Amicus Coquille Indian Housing Authority is the Tribally Designated Housing Entity of the Coquille Indian Tribe, a federally recognized Indian Tribe.

The remaining 53 *amici* are all federally recognized Indian Tribes.

Collectively, *amici curiae* represent a diverse array of individual Indian Tribes and tribal organizations from every region of the United States. *Amici* share a strong interest in this case because of the sweeping impact its resolution could have on their ability (or the

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[1] The Parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief.

ability of their member Tribes) to exercise civil adjudicative jurisdiction over nonmembers on tribal lands. *Amici*'s interest in maintaining such jurisdiction stems from their interests in tribal self-government and the protection of their members and territories; in the maintenance and enforcement of civil law and order on tribal lands; and in ensuring that justice and the protection of the law are extended to all persons on reservation lands.

The exceedingly narrow standards for tribal court jurisdiction over nonmembers proposed by the Petitioners and their *amici*, in particular the proposal to condition tribal court jurisdiction on the "express consent" of nonmembers, would depart radically from this Court's prior decisions and substantially injure the *amici* Tribes' interests. This brief is intended to aid the Court in understanding the severe adverse impact that the Petitioners' proposed jurisdictional standard would have in a wide range of civil cases arising on tribal lands that involve circumstances and concerns beyond those raised or addressed by the Parties in this case.[2]

SUMMARY OF ARGUMENT

An "express consent" standard for tribal civil jurisdiction over nonmembers would depart radically from current standards established by this Court's jurisprudence and is, quite simply, unworkable. As this Court has noted previously, "Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power

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[2] Petitioners and some of their *amici* specifically urge that their proposed express consent standard should apply to *all* civil suits in tribal court. Pet. Br. 19; Br. for *Amicus* Ass'n of Am. Railroads 5; Br. for *Amicus* Retail Litig. Ctr. Inc. 15-16.

instead derives from sovereignty itself." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).[3]

In many cases, an express consent requirement would be absurd and impossible to implement. As a result, it would amount to an effective bar on tribal court jurisdiction over nonmembers in some of the very situations where jurisdiction is most critical to a Tribe's ability to self-govern its own people, territories, and resources. In the case of trespass on tribal lands, for example—a common occurrence often resulting in serious harm to tribal lands, natural resources, and cultural or religious sites—obtaining express consent is inconceivable. Likewise, it is unworkable for Tribes to obtain express consent over every nonmember on tribal lands who has domestic or familial relationships with members and who may come before the tribal court on family law or other domestic matters, including cases of domestic disturbance or abuse requiring civil protection orders or other civil remedies (including tort remedies), or as a result of their participation in tribal programs and services such as housing.

Even where express consent to tribal court jurisdiction could theoretically be obtained through the imposition of permit or licensing requirements for nonmember activities on tribal lands, the consent requirement would only provide an incentive for nonmembers entering tribal lands to "withhold consent" by violating tribal law—i.e., by acting without a permit or license. Without

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[3] Importantly, the last time this Court considered the breadth of tribal jurisdiction, it expressly noted that tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly *or by his actions*." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (emphasis added).

the ability to otherwise enforce valid regulatory requirements in tribal court—the logical result of Petitioners' and their *amici*'s express consent requirement—Tribes would be hamstrung. Tribal authority to impose taxes and other conditions on nonmember activity on tribal lands, acknowledged as valid under well-settled case law of this Court, would also be thrown into doubt.

The existing standards for tribal court jurisdiction over nonmembers established by this Court in *Merrion*, 455 U.S. 130, and *Montana v. United States*, 450 U.S. 544 (1981), avoid disruption to tribal self-government and civil law and order while adequately protecting the legitimate fairness interests of nonmember defendants. This Court need not and should not overturn those decisions nor significantly alter their scope, as requested by Petitioners.

ARGUMENT

I. The "express consent" standard proposed by Petitioners and their *amici* is illogical and unworkable

Tribal courts across the United States routinely exercise jurisdiction over nonmembers who have engaged in tortious conduct on tribal lands. That jurisdiction is an essential aspect of a Tribe's self-government and regulation of its territory, and serves the public interest by providing a local forum for dispute resolution and the enforcement of civil law and order. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n.21 (1978). For over three decades, the scope of that jurisdiction has been considered to be settled under this Court's decisions in *Merrion* and *Montana*.

Petitioners and their *amici* now urge this Court to bar the continued exercise of tribal civil adjudicative jurisdiction over nonmember defendants—even where

the cause of action arises from that nonmember's activity on tribal lands—absent the "express consent" of the nonmember ("*e.g.*, in a forum selection clause of a contract"). Pet. Br. 16.[4] Such a standard, which would require this Court to abandon decades of settled case law, would be utterly unworkable and disruptive in a wide range of situations involving nonmember activities on tribal lands over which Tribes presently exercise jurisdiction.

A. Trespass and related conduct that threatens or harms tribal natural and cultural resources

Tribes utilize their civil jurisdictional authority over nonmembers to enact and enforce laws against trespass. Often, trespass onto tribal lands is accompanied by vandalism or desecration of sacred and cultural sites; theft of cultural artifacts; destruction of tribal property; habitat destruction; theft of firewood, timber, or other resources; illegal cultivation of marijuana; illegal dumping; unauthorized grazing; illegal hunting and fishing; poaching, and the like.[5] In one recent

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[4] *See also*, Pet. Br. 19, 23; Br. for *Amicus* Retail Litig. Ctr. Inc. 16; Br. for *Amici* State of Oklahoma, et al. 16; Br. for *Amicus* Ass'n of Am. Railroads 5, 13.

[5] *See, e.g.*, *Indian Country Priorities for the 114th Congress: Oversight Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 17 (2015) (testimony of Brian Cladoosby, President, National Congress of American Indians), available at http://www.ncai.org/attachments/Testimonial_gwiAHQgGtXVytDaptlvWsMoWXsUfuzSXjeIZFPsQnNINVJDKXWs_Final%20NCAI%20Testimony%20-%20Priorities%20for%20the%20114th%20Congress%2001%2029%2015%20Revised.pdf; Warm Springs Tribal Code § 306.001, available at http://www.warmsprings.com/Warmsprings/Tribal_Community/Tribal_Government/Current_Governing_Body/Tribal_Code_Book/ (legislative finding that "trespass upon Reservation lands has caused or contributed to the following problems:

case, a nonmember who had been driving through a reservation set a fire in the woods after her car ran out of fuel and she got lost. The fire spread and joined with an existing forest fire, burning more than 400,000 acres of land and causing millions of dollars in damage to tribal natural resources. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844 (9th Cir. 2009).

Tribal courts are instrumental in the enforcement of tribal trespass laws and in the recovery of restitution by the Tribe or reservation residents harmed by the trespass. In *Elliott*, the United States Attorney's Office declined to prosecute the nonmember trespasser who started the fire, but the White Mountain Apache Tribe brought a civil action in tribal court seeking civil penalties and restitution for violations of numerous tribal code provisions, as well as for common law negligence and trespass.[6] 566 F.3d at 845. Many tribal codes similarly provide for civil fines, forfeiture, restitution, and other tribal court remedies for trespass and related damage. *See, e.g.*, Coquille Indian Tribal Code, ch.

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(1) Range and forest fires; (2) Injury to or destruction of fish spawning beds; (3) Intrusion on privacy of Reservation residents; (4) Loss of Reservation and resident resources, including firewood, timber, fish, horses, cattle, and other livestock; (5) Injury to tribal housing and loss of rent for tribal housing occupied by trespassers.").

[6] The White Mountain Apache Tribe Natural Resources Code, among other things, prohibits abandoning or leaving a fire unattended and sets civil penalties for violations. White Mountain Apache Tribe Natural Resources Code §§ 1.26, 1.28, available at http://www.wmat.nsn.us/Legal/contents.html. The Code further provides that "the [tribal] court may award payment of costs associated with damage to tribal forest land, including, but not limited to, rehabilitation, reforestation, loss of future revenue, loss of productivity and damage to other forest resources." *Id.* at § 1.29(A)(4)(c).

652 (Trespass Ordinance) (establishing trespass as a civil violation);[7] Skokomish Tribal Civil Trespass Ordinance § 3.07 (defining trespass and vandalism as civil infractions);[8] Warm Springs Tribal Code §§ 306.020-055 (creating three classes of civil infractions for trespass and trespass with intent to commit a crime) and § 306.047 (creating a private cause of action for violation of the Tribe's trespass laws).[9] Tribal codes also address livestock trespass, which is a common issue on many rural reservations, *e.g.*, Pueblo of Laguna Code Section 10-1-13 (violations and enforcement of grazing

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[7] The Coquille Indian Tribal Code is available online at: http://www.coquilletribe.org/CoquilleTribalOrdinances.htm.

[8] Codes and Ordinances of the Skokomish Indian Tribe are available online at: http://www.skokomish.org/skokomish-codes-and-ordinances/. In declaring the purpose of the Skokomish Tribal Civil Trespass Ordinance, the Skokomish Tribal Council stated:

> It is the duty and obligation of the Skokomish Tribal Council to safeguard, protect, manage, administer and develop the natural resources of Tribal lands for the sole economic, cultural, and social benefit of the members of the Tribal Community. The peace, property, and public safety of all persons, both Indian and non-Indian, may be threatened by disruptive, destructive, negligent, or malicious acts.

Id. at § 3.07.002.

[9] In enacting Chapter 306 in 1982, the Warm Springs Tribal Council stated:

> It is the intent of the Tribal Council that Warm Springs Tribal Code Chapter 306 "fill the gap" created by existing federal, state and tribal laws relating to trespass by non-Indians on Reservation land. The present milieu of laws has created a situation in which the Reservation has become a no–mans land with regard to enforcement of illegal entry onto Reservation lands.

Warm Springs Tribal Code § 306.001.

regulations; defining livestock trespass),[10] as well as lease holdover for agricultural or business leases, *e.g*, Jamestown S'Klallam Tribal Code § 31.04.06 (holdover of business lease treated as trespass).[11]

One problem associated with trespass is the high incidence of illegal dumping of hazardous and solid waste on reservation lands. This is especially true for reservations near construction sites or expanding urban and suburban development, where private waste management companies can evade landfill charges by entering reservation lands to dump waste.[12] If a non-Indian dumps waste on reservation lands, states are without authority to enforce civil infractions outside of

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[10] The Pueblo of Laguna Tribal Code is available at: https://www.municode.com/library/nm/pueblo_of_laguna/codes/tribal_code.

[11] The Jamestown S'Klallam Tribal Code is available at http://www.jamestowntribe.org/govdocs/gov_code.htm. Though it may be possible for Tribes to require consent to tribal court jurisdiction when entering into a new lease, there are hundreds of thousands of existing long-term leases in Indian Country that may not include a forum selection clause. *See* 25 U.S.C. § 415 (permitting certain leases of restricted land up to 99 years). An express consent requirement could make it difficult or impossible for Tribes to manage those existing leases and enforce their terms.

[12] *See, e.g.*, Carole Goldberg, *Illegal Dumping in Indian Country* in U.C.L.A. INSTITUTE FOR THE ENVIRONMENT, SOUTHERN CALIFORNIA ENVIRONMENTAL REPORT CARD 2004 23-29 (Ann E. Carlson ed., 2004) (describing the proliferation of illegal dumping of solid and hazardous waste on Indian Reservations in southern California, the economic incentives for waste companies to do so, and how tribal institutions—rather than federal and state—are the only realistic options for stopping such dumping). *See also* Lauren Straub, *Dumping at Reservation Blocked*, L.A. TIMES, Aug. 5, 1994, http://articles.latimes.com/1994-08-05/local/me-23817_1_reservation-blocked (noting that private waste management companies trucked more than 3,000 tons of solid waste to the Torres Martinez reservation from neighboring counties each week).

their jurisdictions, and the Environmental Protection Agency has disclaimed any ability to act without an impact on water resources.[13]

In response, Tribes have enacted solid waste or illegal dumping codes and ordinances that provide for civil penalties, fines, and asset forfeiture applicable to non-Indian perpetrators (over whom tribal criminal authority does not extend). *See, e.g.*, Fort McDowell Law & Order Code ch. 23 (Environmental Code) §§ 23-12 to 23-15 (civil and criminal penalties for violating prohibitions on illegal dumping of solid or hazardous waste).[14] Such procedures and processes are the only realistic way for Tribes to prevent or sanction illegal dumping by non-Indians on their lands. To require a person dumping waste illegally on reservation land to provide express consent to enforcement jurisdiction would be impossible, and tribal ordinances recognize as much by providing that jurisdiction extends to all persons within the reservation.[15]

The rampant looting of archeological sites on tribal land also presents a great challenge for many Tribes, with devastating consequences for scientific inquiry in general as well as tribal cultural and spiritual concerns.

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[13] Goldberg, *Illegal Dumping in Indian Country*, *supra* note 12, at 26-27.

[14] The Fort McDowell Yavapai Community Tribal Environmental Code is available at http://www.narf.org/nill/codes/fort_mcdowell/index.html.

[15] *See, e.g.*, Fort McDowell Law & Order Code ch. 23, §§ 23-2 to 23-4. *See also*, Hopland Band of Pomo Indians Code, tit. 20, ch. 5 (Hopland Tribe Solid Waste Management Code) § 4.3, available at http://www3.epa.gov/region09/waste/tribal/pdf/hopland-hw-manage-plan.pdf; Statutes of the Pit River Tribes of California tit. 15, ch. 1 (Solid Waste Disposal Ordinance) § 203, available at http://www.narf.org/nill/codes/pitrivercode/.

Although there are a number of federal laws that criminalize this activity,[16] a severe lack of enforcement manpower means that only a fraction of the looters are caught, and even fewer successfully prosecuted.[17] Most of these looters are not tribal members and therefore in the absence of a sufficient federal effort, a Tribe's sole recourse is to assert its civil jurisdiction.[18]

Trespass and related conduct by nonmembers such as illegal dumping or looting on tribal lands directly impacts a Tribe's territory, its natural resources, and its cultural heritage. Without the ability to enforce its laws and seek redress within its own jurisdiction for such offenses, the Tribe would be stripped of "the tools necessary to self-government and territorial control." *Merrion*, 455 U.S. at 139.

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[16] *See, e.g.*, Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee; Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601 §4(a), 18 U.S.C. § 1170.

[17] Leslie Macmillan, *Regulations for Native American 'artifacts' auctions may still be too lax*, HIGH COUNTRY NEWS (Nov. 18, 2013), https://www.hcn.org/blogs/goat/regulating-native-american-artifacts-auctions.

[18] *Cf. Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475 n.11 (9th Cir. 1989); *Chilkat Indian Vill. v. Johnson*, No. 90-01, 20 Indian L. Rep. 6127, 6142 (Chilkat Trib. Ct., Nov. 3, 1993); *After a Court Fight, Old Totems Return to an Alaskan Village*, N.Y. TIMES, Oct. 17, 1994, http://www.nytimes.com/1994/10/17/us/after-a-court-fight-old-totems-return-to-an-alaskan-village.html (tribal art returned to Tribe as a result of tort claims in tribal court).

B. Intentional conduct that threatens the safety of tribal members on tribal lands

The most abhorrent offenses committed by nonmembers on Indian reservations are those committed against tribal members themselves. With respect to the protection of tribal members against domestic abuse and sexual assault, for example, the *amicus* brief filed in this case on behalf of the National Indigenous Women's Resource Center, Inc. and other advocacy organizations for survivors of domestic violence and assault powerfully illustrates why an express consent standard would critically undermine a Tribe's ability to protect its members, and even its own survival.[19] In no other jurisdiction would accountability for such heinous acts be conditioned on the express consent of the perpetrator, and for obvious reasons.

The problem of lawlessness and violence on tribal lands is not limited to domestic violence and sexual assault. The Bureau of Justice Statistics reported in 2004 that "[t]he rate of violent crime estimated from self reported victimizations for American Indians is well above that of other U.S. racial or ethnic groups and is more than twice the national average."[20] Further, "American Indians are more likely than people of

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[19] Even in the absence of criminal jurisdiction over non-Indian offenders, tribal civil authority can provide critical protection and enforcement, including tort remedies, enforcement of civil protection orders, and procedures for requesting exclusion of offenders from tribal lands. *See, e.g.*, Coquille Indian Tribal Code §§ 652.150, 652.385 (defining trespass to include entry in violation of any restraining order, and permitting any resident of the Reservation to make an application to the Tribal Court requesting that a person be excluded, following a hearing to show cause).

[20] Steven W. Perry, *American Indians and Crime, A BJS Statistical Profile 1992-2002*, iii. Washington, D.C.: U.S.

other races to experience violence at the hands of someone of a different race[.]"[21] It is widely recognized that the high rates of crime and violence committed by non-Indians on Indian reservations is driven in large part by the narrow scope of tribal criminal jurisdiction, and the fact that non-Indians who commit crimes in tribal communities go unpunished by any other jurisdiction more often than not.[22] Simply put, non-Indian criminals believe they can act with impunity on Indian lands.[23]

Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (NCJ 203097, Dec. 2004).

[21] *Id.*

[22] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEP'T OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 6 (2010) (the Department of Justice declined to prosecute fifty percent of the cases referred to it from law enforcement agencies in Indian Country between 2005 and 2009); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV 697, 710-23 (2006) (law enforcement by States on Indian reservations ineffective).

[23] *E.g.*, S. Rep. No. 112-265, at 7 (2012) ("Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system."); Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC, Feb. 22, 2013, http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/; Gary Fields, *On U.S. Indian Reservations, Criminals Slip Through Gaps: Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases*, WALL ST. J., June 12, 2007, http://www.wsj.com/articles/SB118161297090532116.

In light of the extent to which Tribes rely on their civil authority to fill gaps in criminal jurisdiction on Indian reservations, a rule of law permitting nonmembers to evade civil as well as criminal jurisdiction by withholding express consent would seriously undermine the ability of tribal governments to maintain law and order within their territories. In *One Thousand Four Hundred Sixty Three Dollars v. Muscogee (Creek) Nation*, involving a non-Indian who transported methamphetamines onto treaty lands owned by the Tribe and the site of a tribally-owned casino, the Supreme Court of the Muskogee (Creek) Nation observed:

> The only means in which the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation's civil code. It is imperative that the Nation possess certain regulatory authority over all persons entering the Nation's land and business enterprises, as this case reflects.

No. SC 2005-01, 2005 WL 6218811 at *6 (Muscogee (Creek) Apr. 29, 2005) (civil citation for disorderly conduct for possession and intent to distribute controlled dangerous substance, and civil forfeiture proceeding for vehicle used to transport illegal drugs onto tribal lands and cash and drugs found in vehicle).

As the case at bar demonstrates, individual tort remedies are one important way to curb criminal activity on reservation lands in the absence of criminal jurisdiction. Other types of civil regulations and citations also play an important role in maintaining public safety on tribal lands, such as civil citations to regulate driving on tribal roads—one of the most common (and potentially dangerous) nonmember activities on

tribal lands.[24] If this kind of regulation were contingent on express consent, it would be effectively nullified.

C. Domestic relations on tribal lands involving nonmembers

Tribal courts also play an important role in the maintenance of civilized society by providing a forum for the peaceful resolution of domestic and other civil matters that arise at the local level. Nonmembers are frequently involved in such disputes as a result of their personal relationships with tribal members and entry or residence on tribal lands. An express consent requirement would frequently preclude jurisdiction over them in tribal court, however, creating a local jurisdictional gap on reservation lands.

The adjudication of family law matters, for example, including custody of tribal member children with a nonmember parent residing on tribal lands, is not only a local matter most appropriate for resolution in the

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[24] *See, e.g.*, Three Affiliated Tribes of the Fort Berthold Indian Reservation, Civil Motor Vehicle Code, tit. X, ch.3, § 10-3-1, http://www.mhanation.com/main2/elected_officials/elected_officials_resolutions/resolutions_2011/Aug%2011%202011%20Meeting.pdf (legislative finding that "the lack of enforcement of motor vehicle laws on the Highways and roads on the Reservation against non-Indian operators has become a number one public safety concern on the Reservation and that the disregard for motor vehicle laws on the Reservation threatens and has direct effect on the political integrity, the economic security and the health and welfare of the Tribe and its members"). Tribes generally maintain civil jurisdiction over nonmember activity on "tribal roads" not subject to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), which may be open to the public but are maintained by the Tribe or by the Bureau of Indian Affairs with no right-of-way grants to a state or local government. *See, e.g.*, *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

local (tribal) courts, but is also core to a Tribe's right to control internal relations and to make its own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). In fact, federal, state and tribal courts regularly hold that tribal courts should retain jurisdiction over such cases for that very reason. *See, e.g.*, *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988); *Miodowski v. Miodowski*, No. 8:06CV443, 2006 WL 3454797 (D. Neb. Nov. 29, 2006); *Byzewski v. Byzewski*, 429 N.W. 2d 394 (N.D. 1988); *Kelly v. Kelly*, No. DV 08-013, 2008 WL 7904116 (Standing Rock Sioux Trib. Ct. June 23, 2008). Yet it is these very cases—cases which arise from everyday occurrences and social and domestic relationships between members and other individuals living on tribal lands—that are least likely to involve written documents specifying a judicial forum for dispute resolution. Petitioners' extreme express consent standard would preclude tribal court jurisdiction in such matters.

D. Nonmember family members benefitting from tribal programs and services

Nonmembers who enter into domestic relationships with tribal members frequently become eligible for or incidentally benefit from tribal programs and services carried out by the Tribe for the benefit of its members and their families. As a consequence, Tribes regularly exercise civil jurisdiction over those nonmembers in order to preserve the integrity of the governmental services and programs they offer on their own lands. In these cases, an express consent requirement would needlessly burden the regulation of tribal governmental programs, in derogation of a Tribe's right to self-govern its people and territories.

For example, tribal housing authorities rely on the availability of remedies in tribal court in the operation of tribal housing programs, and from time to time it is necessary for them to initiate eviction or trespass proceedings against occupants of tribal housing who have engaged in criminal activity, have otherwise become a threat or nuisance to their neighbors, or have taken possession of a unit without permission. Commonly, tribal housing authorities require that the individual who signs the housing lease as head of household be a tribal member, and thus no questions arise with respect to tribal court jurisdiction over those individuals. However, nonmember family members who are not signatories to the lease may also be present in tribal housing, sometimes without the knowledge or permission of the housing authority.

For instance, the Housing Authority for *amicus* Confederated Tribes of the Colville Reservation is currently facing a situation arising from the death of a tribal member who was residing in the home under the terms of a lease-to-own agreement. Several of her relatives (nonmembers of the Tribe) moved into the home before the Housing Authority learned of the tenant's death, and now will not vacate voluntarily. They have not signed any lease, and are in trespass. The Housing Authority may need to rely on the Tribal Court to have them removed.

In another case, *amicus* Coquille Indian Housing Authority was forced to file a complaint in tribal court against a family that, in applying for tribal housing, had falsely represented that the head of household was a tribal member. In fact, no family member was a tribal member. When the Housing Authority learned of the fraud, it first sent a letter demanding that the family vacate, but the family refused. The family did

eventually vacate before any hearing was held, but without the threat of an eviction action in tribal court, the Housing Authority may have been powerless to remove those individual members of the household who had not signed the lease from the tribal housing unit. Presumably, if the nonmember family (who was willing to perpetrate a fraud against the Tribe) could have evaded tribal court jurisdiction by "withholding consent" to tribal court jurisdiction, they would have done so.

The Housing Department for *amicus* Klamath Tribes has similar concerns. The Housing Department is currently aware of a nonmember spouse or other nonmember adult residing in at least 20 out of the 84 households managed by the Housing Department, and there are likely others of whom they are unaware. There have been instances where a tribal member head of household fled because of domestic violence perpetrated by the nonmember living in the home. In such cases, the Tribes rely on the Tribal Court to evict that nonmember (who is not a lease signatory). If the Tribes were unable to initiate those eviction proceedings, short of the Tribes resorting to self-help measures, the abuser could obtain eviction-proof housing as a direct benefit of his or her abusive and violent acts toward the head of household.

E. Licensed and otherwise regulated activities by nonmembers on tribal lands

Tribes permit many nonmembers onto their lands for commercial and recreational purposes. It is well settled that Tribes retain the ability to regulate these activities and, for example, impose licensing or taxation requirements on them. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*,

447 U.S. 134, 152 (1980) (Tribes retain sovereignty to tax transactions occurring on trust lands); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (approving applicability of hunting and fishing regulations to non-Indians on tribal land); *Montana*, 450 U.S. at 557 (same). If express consent were required in order for a Tribe to enforce its regulatory requirements or to adjudicate torts or other disputes arising from regulated activities, it would undermine the ability of Tribes to exercise their long-recognized regulatory powers on their own lands. In fact, it would provide a perverse incentive for nonmembers to "withhold consent" by violating tribal law—i.e., by engaging in the regulated activity on tribal lands without a license or permit.

This is not a hypothetical fear. For example, *EXC, Inc. v. Kayenta Dist. Court*, No. SC-CV-07-10, 9 Am. Tribal Law 176 (Navajo Sept. 15, 2010), involved a nonmember tour bus operator that was sued for negligence in the courts of the Navajo Nation in connection with a fatal motor vehicle accident that occurred on the Navajo Reservation. The tour operator had failed to obtain a required tour activity permit, even though it regularly passed through Navajo territory, scheduled overnight stays on the Navajo Reservation, and stopped at the Monument Valley Navajo Tribal Park (a tribally administered natural park and tourist attraction) as part of its marketed package tours. The permit, which is required under the Navajo Nation Tour and Guide Services Act, requires the permit holder to specifically consent to jurisdiction of the Navajo Nation's courts. The tour bus operator argued that "by not acquiring the necessary vehicle tour permit from the Navajo Nation Parks and Recreation Department and signing the requisite agreement, they effectively withheld their consent to Navajo Nation court jurisdic-

tion sufficient to evade jurisdiction" despite their regular presence on the Navajo Reservation as part of their tour business. *Id.* at 184. Not surprisingly, the court did not accept this misplaced, nonsensical argument.[25]

This Court has also expressly rejected the argument that a Tribe's regulatory powers are contingent on the express consent of those subject to the regulation. *Merrion*, 455 U.S. at 147. That ruling could effectively be overturned if the Court were to radically alter the standard for enforcement of tribal laws against nonmembers in tribal court as Petitioners' and their *amici* propose.[26] The resulting uncertainty would throw current tribal taxation and other regulatory schemes into chaos with devastating impacts on many Tribes.

For example, many Tribes rely on production and severance taxes from oil and gas extraction and other commercial activity to support their tribal governments. Between September 2013 and February 2014 alone, for instance, the Three Affiliated Tribes received $120,233,563 in taxes from oil tax allocations due to

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[25] The Navajo Supreme Court remarked that it was an "obvious tenet of governance" that "no person or entity may deny the Navajo Nation's regulatory and adjudicatory jurisdiction on the basis of a violation of our laws." *EXC, Inc.*, 9 Am. Tribal Law at 185. The United States District Court for the District of Arizona agreed, but found that tribal court jurisdiction was lacking on other grounds. *EXC, Inc. v. Jensen*, No. CV 10-08197, 2012 WL 3264526 (D. Ariz. Aug. 9, 2012), *aff'd*, 588 Fed. Appx. 720 (9th Cir. 2014). A petition for a writ of certiorari was filed with this Court on July 13, 2015, *Jensen v. EXC* (July 13, 2015) (No. 15-64).

[26] This Court has indicated that tribal adjudicative jurisdiction and legislative jurisdiction are coextensive. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 652 (2001). It would be anomalous for any government to have valid legislative and regulatory authority but not adjudicative enforcement authority over the same individuals and activities within its territory.

extraction on the Tribe's reservation.[27] Those funds would cease if Tribes were suddenly forced to ask producers for consent—no producer would agree to such a tax if given a choice—or if those producers believed they could evade enforcement.[28]

F. Locally-based torts and other disputes between members and nonmembers arising on tribal lands

Myriad other categories of disputes arise between members and nonmembers on tribal lands. Tribal courts currently exercise their jurisdiction to ensure

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[27] North Dakota Legislative Council, *Three Affiliated Tribes – Oil and Gas Agreement and Oil Tax Allocations* (July 2014), *available at* http://www.legis.nd.gov/files/resource/committee-memorandum/15.9220.02000.pdf?20151013012911. The Tribe is allocated 50% of the tax; the State of North Dakota receives an equal amount.

[28] Similarly, the proposed express consent standard would effectively nullify hundreds of tribal regulatory laws applicable to anyone on Indian and trust land by removing tribal enforcement authority. *See, e.g.*, Stockbridge Munsee Tribal Law Land Ordinance, ch. 40, § 40.13 (land assignment ordinance governing land rights for nonmembers if a member spouse dies), available at http://www.mohican-nsn.gov/Departments/Legal/Ordinances/; Reno Sparks Indian Colony Ordinance No. 45 (Graffiti Ordinance) (Reno Sparks Indian Colony ordinance setting forth fines and community service for graffiti for any offender), available at http://www.rsic.org/rsic-services/court-services/tribal-ordinances/; Pokagon Band of Potawatomi Indians Child Safety Zone Act, ch. 4 (providing for civil fines for violation of Act that bars registered sex offenders from tribally designated child safety zones), available at http://www.pokagon.com/government/codes-and-ordinances; Poarch Band of Creek Indians Code of Ordinances, tit. 40 ch. 5, § 40-5-1 (enforcement of tribal alcohol beverage control ordinance applicable to any seller, Indian and non-Indian), available at https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances.

that justice is available to the parties in those cases where the nonmember's consensual acts have been sufficient to justify such jurisdiction. *E.g.*, *Clark v. Richter*, No. 300, 2 Am. Tribal Law 179 (Fort Peck Ct. App. Feb. 18, 2000) (medical malpractice claim against nonmember doctor providing services to tribal members on reservation); *Carmona, M.D. v. Acoma Pueblo Tribal Court*, No. 97-CV-06, 25 Indian L. Rep. 6123 (Acoma Pueblo Ct. App. Mar. 21, 1998) (same); *Wolf Point Org. v. Inv. Centers of Am., Inc.*, No. 324, 3 Am. Tribal Law 290 (Fort Peck Ct. App. Feb. 6, 2001) (action alleging fraud and negligence against nonmember investment company that solicited business from tribal community organization); *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (tribal court properly exercised jurisdiction over action for negligence involving injury to tribal member allegedly caused by nonmember defendant's horse, which trespassed onto a tribal road).

Petitioners and their *amici* suggest that their express consent standard would have little impact on these cases, even though it would preclude tribal court jurisdiction in many of them, because state and federal courts exist as alternative forums to hear these disputes. To the contrary, precluding tribal member plaintiffs from bringing claims in tribal court would frequently result in a denial of justice.

In the experience of the *amici* submitting this brief, many tribal member plaintiffs simply would not pursue their claims in state or federal court, which may be located far from their homes, require a much greater investment of time and money, or appear foreign or intimidating. Many tribal members, for example, lack reliable transportation necessary to reach non-local

courts.[29] Comprehensive studies on access to justice in Indian Country from both state and federal sources show that state law enforcement and court institutions do not serve tribal communities well.[30] Many scholars have also documented the difficulties that tribal members and reservation citizens have when attempting to access federal and state courts.[31] Moreover, there is no need to remove local disputes to state or federal court. As the brief of *amici curiae* Puyallup Tribe of Indians, et al. in support of Respondents in

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[29] *See* Kathleen O'Halleran, *Contemporary Social Pressures Facing American Indians*, in AMERICAN INDIANS AT RISK 557, 563-564 (Jeffery I. Ross ed., 2014).

[30] *See* Goldberg & Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, *supra* note 22, at 711; Carole Goldberg, Duane Champagne & Heather Valdez Singleton, FINAL REPORT; LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007).

[31] *See, e.g.*, Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711 (2006) (". . . the challenge facing a victim or witness from the Red Lake Band of Ojibwe Reservation near the Canadian border in northern Minnesota who may be required by federal summons to travel 250 miles or more of back roads and highways to reach federal court in St. Paul or Minneapolis, Minnesota."); *Id.* at 711 n.6 (". . . the Fort Peck Reservation is nearly 300 miles from the federal courts in either Great Falls or Billings, and both drives could easily take six hours in good weather."); Troy A. Eid, *Beyond* Oliphant: *Strengthening Criminal Justice in Indian Country*, 54-APR FED. LAW. 40, March/Apr. 2007, at 42 (". . . the nearest U.S. district judge serving the citizens of [the Ute Mountain Ute Reservation] is more than 400 miles away in Denver, an eight-hour drive—even in good weather."); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 U.C.L.A. L. REV. 553, 569 n.97 (2009) (referencing a tribal court administrator in Arizona for whom the closest federal detention center is a nine-hour drive to another state).

this case establishes, tribal courts are no less competent, fair, or accessible than their sister courts in the handling of these cases.

Tribal member plaintiffs, like other plaintiffs, are entitled to bring their claims in the forum of their choosing, and in particular, in the forum local to where their claim arises. *See, e.g.*, *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) ("plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations)"); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient."). Aside from the plaintiff's choice, the convenience of the parties, the location of witnesses and evidence, and the interests of justice are prime considerations in determining the proper venue in the ordinary federal court action. *Atl. Marine Const. Co.*, 134 S. Ct. at 581; *Id.* at n.6. When it comes to claims arising from consensual conduct on tribal lands, the same policy considerations apply, and all weigh in favor of tribal court jurisdiction. State and federal courts, while appropriate as alternative venues in some cases, are not substitutes for local tribal courts.

II. The existing jurisdictional standards established in *Merrion* and *Montana*, rooted in the protection of tribal self-government, are realistic, workable, and fair

In these and other classes of cases, restricting tribal court jusrisdiction over nonmembers on tribal lands by imposing an "express consent" or other narrow standard could have devastating consequences for Tribes nationwide. Broader standards, by contrast, are firmly rooted in this Court's precedent and strike a proper balance

between tribal sovereignty, on the one hand, and the interests of nonmembers and other sovereigns, on the other. These existing standards, established by this Court in *Merrion v. Jicarilla Apache Tribe* and *Montana v. United States* and further refined in subsequent cases, have worked well when properly applied by the lower courts.

A. Tribes retain significantly broader authority to regulate and adjudicate the conduct of nonmembers on tribal lands, where tribal self-government interests are strongest

This Court's decisions governing tribal civil jurisdiction over nonmembers have been consistently rooted in the principle that Tribes retain those powers necessary to protect tribal self-government, control internal relations, and to manage tribal lands. *Montana*, 450 U.S. at 564; *Merrion*, 455 U.S. at 137; *Plains Commerce Bank*, 554 U.S. at 334. From this general principle, the Court has announced specific rules and exceptions to govern different circumstances; however, if these powers are to have any meaning at all, they must encompass the right of Tribes to enact and enforce civil laws to protect themselves and their people from trespass or violence, to manage and protect cultural and natural resources, and to maintain civil society *on their own lands*.

In this case, the events giving rise to this lawsuit took place on Mississippi Choctaw's tribal trust land. This Court's precedent has recognized that Tribes retain significantly broader latitude to regulate and adjudicate the conduct of nonmembers on such tribal lands than on non-Indian fee lands. That is so because a Tribe's interests in self-government and territorial management are strongest on its own lands and because the Tribe

retains its inherent authority to exclude nonmembers from those lands altogether.[32] While the Court need not determine in this case precisely how *much* latitude Tribes have in this respect, that latitude certainly encompasses situations—such as this one—in which a defendant willfully enters onto a Tribe's land and commits torts against the Tribe or its members.

Petitioners' argument to the contrary dangerously misreads this Court's precedent. In *Montana*, this Court set out a "general proposition" with respect to non-Indian fee lands, holding that tribal jurisdiction does not extend to nonmembers, subject to two exceptions designed to account for the sovereign right of Tribes to exercise self-government and to control internal relations. 450 U.S. at 564-65.[33] However, *Montana* itself was clear that the exercise of tribal jurisdiction on trust land is not limited to those two exceptions. Rather, the Court in *Montana* "readily agree[d]" that, "on land belonging to the Tribe or held by the United States in trust for the Tribe," a Tribe may regulate activities of nonmembers. 450 U.S. at 557. As to its specific holding delineating the two exceptions, the

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[32] *Montana*, 450 U.S. at 557 (distinguishing land owned by or held in trust for the Tribe from fee land owned by nonmembers and agreeing that the Tribe may prohibit or regulate hunting and fishing on such tribal lands); *Merrion*, 455 U.S. at 138, 141-42 (upholding a Tribe's power to tax nonmember activity on tribal lands and observing that a Tribe's interests in levying taxes is strongest when the taxed activity takes place on tribal lands).

[33] The two exceptions are as follows: (1) where the nonmember "enter[ed] consensual relationships with the tribe or its members"; or (2) where the nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66.

Court made clear that it was referring to "land owned in fee by nonmembers of the [t]ribe." *Id.*

Subsequent decisions of this Court have confirmed this understanding of the scope of the *Montana* rule and its exceptions. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (describing *Montana* and its exceptions as "[r]egarding activity on non-Indian fee land"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) (referring to "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land").

Less than one year after *Montana*, the Court in *Merrion* upheld the Jicarilla Apache Tribe's ability to tax nonmember businesses as an exercise of "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction" and "a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137. Alternatively, the Court reasoned, the Tribe had authority to impose the tax by virtue of its power to exclude nonmembers—a power that "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation." *Id.* at 144. The Court in *Merrion* reached these conclusions without ever suggesting that *Montana* might pose any bar to the Tribe's exercise of such authority.

To be sure, later decisions of this Court have indicated that tribal jurisdiction over nonmembers on tribal lands is not absolute. *See Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank*, 554 U.S. 316. However, those decisions do not fundamentally alter the general framework created in *Merrion* and *Montana* or their distinction between fee lands and tribal lands.

In *Hicks*, the Court addressed the narrow—and factually extreme—question of tribal court jurisdiction over tort claims arising from state law enforcement's execution of a search warrant relating to off-reservation violations of state law. Specifically limiting its decision to the "question of tribal-court jurisdiction over state officers enforcing state law," 533 U.S. at 358 n.2, the Court held that tribal court jurisdiction was precluded because "the principle that Indians have the right to make their own laws and be governed by them requires an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 362 (internal quotations omitted).[34] Though the Court noted that Indian land ownership does not "suspend[] the 'general proposition'" that the exercise of tribal jurisdiction over nonmembers must be "'necessary to protect tribal self-government or to control internal relations,'" *id.* at 359 (quoting *Montana*, 450 U.S. at 564-65), the Court nevertheless recognized that in the ordinary case the status of the land in question is "significant" and "may sometimes be a dispositive factor" in determining whether that requirement is met.

In *Plains Commerce Bank*, the issue before the Court concerned the Tribe's ability to regulate the sale of non-Indian fee land, which the Court held was not justified under *Montana*. 554 U.S. at 332, 340. The Court's holding did not establish a standard for the exercise of tribal civil authority over nonmembers on *tribal lands* and did nothing to limit or alter the general rule

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[34] The Court accordingly held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations[.]" *Hicks*, 533 U.S. at 364.

that Tribes retain inherent authority to manage their territories, protect tribal self-government, and control internal relations—interests which are at their strongest on lands owned by or held in trust for the Tribe. *Id.* at 334.

Citing *Merrion*, the Court in *Plains Commerce Bank* acknowledged that tribal land ownership and a Tribe's right to exclude are significant. *Id.* at 333 (noting that the Court's cases since *Montana* have generally upheld regulatory authority on tribal lands, but rarely upheld such authority over fee lands, based upon the impact to the Tribe); *id.* at 335 (recognizing that the power to exclude persons from tribal lands includes the power to set conditions on entry in the form of regulatory authority). The Court also emphasized that Tribes "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security," and can do so "by regulating nonmember activity on the land." 554 U.S. at 336 (emphasis omitted).

In the case now before the Court, the Mississippi Choctaw Tribe has shown that jurisdiction was eminently justified because it derived from the Tribe's rights "to set conditions on entry, preserve tribal self-government, or control internal relations," as articulated by this Court in *Plains Commerce Bank*, *id.* at 337, and because Dollar General was engaged in a consensual relationship with the Tribe under *Montana*'s first exception. However, *amici* urge the Court not to resolve this case in a manner that could be interpreted as requiring that one of the *Montana* exceptions be met in *every* case arising on tribal lands. Such a ruling could preclude Tribes from protecting themselves and their members against the kinds of "noxious uses" of land

discussed in this brief and referred to by the Court in *Plains Commerce Bank*.[35]

In any event, this case presents no compelling reason for the Court to abandon decades of precedent, which has never conditioned the exercise of tribal jurisdiction over nonmembers on express consent, even where the *Montana* exceptions apply.[36] The absence of an express consent requirement does not mean that a nonmember defendant is without the ordinary procedural protections that condition the exercise of jurisdiction by any other court within the United States. As with other jurisdictions, nonmembers can avoid becoming subject to tribal authority by abstaining from entering onto tribal trust lands or engaging in consensual relationships with Tribes or tribal members. But at the very least, where a nonmember has knowingly

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[35] In the context of non-Indian fee lands, the *Montana* exceptions have been interpreted in a restrictive manner that would not make sense on tribal trust lands. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 330, 341 (stating, in the context of non-Indian fee land, that the *Montana* exceptions "are 'limited' ones," and noting that nonmember conduct must "imperil the subsistence" of the Tribe in order for the second *Montana* exception to apply) (citations omitted). As noted above, however, the Court seems to have simultaneously recognized that such narrow standards should not apply on trust lands, lest the Tribe lose its ability to protect itself from harmful uses of, or activities on, those same lands. *Id.* at 336.

[36] *See Montana*, 450 U.S. at 565 (explaining that a Tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"); *Strate*, 520 U.S. at 446 (same); *Plains Commerce Bank*, 554 U.S. at 329 (same); *id.* at 337 (nonmember may consent "either expressly *or by his actions*.") (emphasis added); *cf. Merrion*, 455 U.S. at 147 (explaining that "Indian sovereignty is not conditioned on the assent of a nonmember").

entered into relations with a Tribe or its members on the Tribe's trust lands, as in this case, it is fair for him or her to expect to be subject to tribal regulatory and adjudicatory authority.[37] *Montana*, 450 U.S. at 557; *Merrion*, 455 U.S. at 138, 141-42; *Plains Commerce Bank*, 554 U.S. at 333.

B. The standards established in *Merrion* and *Montana* are both workable and necessary in light of current self-government policies and developments in Indian Country

The exercise of tribal jurisdiction over nonmembers has become increasingly important as Indian Tribes work to recover from the aftermath of failed policies of federal paternalism and begin to flourish again under their own self-government. Over the last several decades, Congress and the Executive Branch have pursued policies that strongly favor tribal development, self-determination, and local self-control,[38] expressly

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[37] *Amicus* the State of Oklahoma's example of a driver subject to tribal jurisdiction by virtue of chance activities at a rest stop is a strawman, for it may not actually involve the sort of willful conduct that supports tribal jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 337 (tribal law "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.").

[38] For example, Congress has sought to improve tribal governance and economies by passing statutes such as the Indian Financing Act of 1974, *see* 25 U.S.C. § 1451 *et seq.*, the Indian Self Determination and Education Assistance Act of 1975, *see* 25 U.S.C. § 450 *et seq.*, and the Indian Reorganization Act of 1934, *see* 25 U.S.C. § 461 *et seq*. In recent years, Congress has bolstered these federal efforts through the Indian Gaming Regulatory Act, *see* 25 U.S.C. § 2701 *et seq.*, intended to provide Tribes with a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments," *id.* § 2702(1). Likewise, the Native American Housing Assistance and Self-Determination Act

rejecting past policies that inhibited, even dismantled, the full functionality of tribal governments.

Self-determination policies that seek to rebuild and strengthen tribal governments and economies have resulted in enormous improvements in the lives of tribal members, as well as nonmembers living on reservations and in surrounding communities. They have also brought significant changes to Indian Country, including improved social and economic opportunities that bring more nonmembers to tribal lands and result in greater interaction between tribal members, nonmembers, and the tribal government. Not surprisingly, then, the implementation of self-determination policy has not only supported the strengthening of tribal judiciaries, but *necessitated* them.

Tribal housing is a prime example. Programs made possible under the Native American Housing Assistance and Self-Determination Act and other self-determination policies and programs have permitted Tribes to offer government housing programs that make a real difference in the lives of tribal members and their families. Most Tribes were not able to offer such programs until relatively recently. The operation of these programs creates new circumstances under which the exercise of

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of 1996, *see* 25 U.S.C. § 4101 *et seq.*, provided assistance "in a manner that recognizes the right of Indian self determination and tribal self-governance" and with the "goals of economic self-sufficiency and self determination for tribes and their members," *id.* §§ 4101(6)-(7). *See also*, President Barack Obama, Remarks at the White House Tribal Nations Conference (Dec. 5, 2012), http://www.presidency.ucsb.edu/ws/index.php?pid=102735; President George W. Bush, Proclamation 8313: National American Indian Heritage Month (Oct. 30, 2008), http://www.presidency.ucsb.edu/ws/index.php?pid=84752.

tribal self-government requires tribal court jurisdiction over nonmembers, like eviction from tribal housing. Viewed in this light, the growth in tribal court jurisdiction over nonmembers is a positive development resulting from the overall revitalization of reservation communities.

This Court has been cognizant of the United States' "firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n.10 (1980) (citations omitted). Critically, this Court has made clear that the "federal policy of promoting tribal self-government *encompasses the development of the entire tribal court system.*" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987) (emphasis added). Accordingly, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of *both Indians and non-Indians.*" *Santa Clara Pueblo*, 436 U.S. at 65 (emphasis added); *cf. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (explaining that the tribal exhaustion doctrine provides tribal courts with "the first opportunity to evaluate the factual and legal bases for [a] challenge" to their jurisdiction).

As Tribes continue to make strides in the self-determination era to improve conditions throughout Indian Country for all of its residents, now is not the time to upend decades of this Court's precedent, Congressional and Executive policy, and settled expectations of tribal authority that have made those strides possible. Rather than adopt a radical "express consent" standard that would all but preclude the exercise of tribal jurisdiction over nonmembers and substantially impair the maintenance of law and order on tribal

lands, this Court should reaffirm the existing jurisdictional standards adopted in *Merrion* and *Montana*, recognizing the primacy of tribal court civil jurisdiction on tribal lands.

CONCLUSION

For the reasons stated, this Court should affirm that tribal courts retain civil jurisdiction over the activities of nonmembers on tribal lands.

Respectfully submitted,

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October 22, 2015

AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,

Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND ADDITIONAL ADVOCACY ORGANIZATIONS FOR SURVIVORS OF DOMESTIC VIOLENCE AND ASSAULT IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Petitioner's assertion that Indian Tribes should be stripped of all civil jurisdiction over non-Indians absent "express consent" compels the *Amici* identified herein to offer their view on the critical relationship between tribal jurisdiction, the inherent authority of Tribal Governments to self-govern, and safety for Native women and children.[1]

The leading signatory, National Indigenous Women's Resource Center, Inc. ("NIWRC"), is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States; collectively, these women have extensive experience in tribal courts, tribal governmental process, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

NIWRC is joined by 104 additional organizations that share NIWRC's commitment to ending domestic violence, rape, sexual assault, and other forms of violence in the United States (collectively, the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On August 7 and 10, 2015, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

"NIWRC Amici").[2] The depth of the NIWRC Amici's experience in combatting violence render them uniquely positioned to offer their views on the need for accountability in the community where the assault occurs, and accordingly, the necessity of tribal jurisdiction over non-Indians to ensure Native women and children are protected, regardless of their perpetrators' race, ethnicity, or citizenship.

SUMMARY OF THE ARGUMENT

The Nation shall be strong so long as the hearts of the women are not on the ground.

Tsistsistas (Cheyenne)

The extraordinary magnitude of violence and sexual assault perpetrated against Native women and children today constitutes one of the greatest threats to the integrity and continued existence of Tribal Governments. Native women are more likely to be battered, raped, or sexually assaulted than any other population in the United States.[3] Likewise, Native children suffer rates of trauma 2.5 times higher than the national average.[4] "Even the most conservative

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[2] The 104 additional NIWRC *Amici* are identified and listed in Appendix A to this brief.

[3] Lawrence A. Greenfeld & Steven K. Smith, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *American Indians and Crime*, NCJ 173386, 3-4 (1999) (hereinafter "1999 Report").

[4] Dolores Subia BigFoot, Sadie Willmon-Haque & Janie Braden, Indian Country Child Trauma Ctr., *Trauma Exposure in American Indian / Alaska Native Children* 2 (2008).

estimates indicate that it is an extremely serious problem."[5]

When a Tribal Government cannot protect its women, the entire nation is in jeopardy. Women perpetuate the existence of all tribal communities, and they hold critical leadership positions in many Tribal Governments. Further, as this Court has previously noted, nothing is "more vital to the continued existence and integrity of Indian tribes than their children,"[6] and consequently, the extraordinarily high rates of violence against Indian children—and the mothers who raise them—imperils the ability of Tribes to perpetuate their own existence and effectively self-govern. Because "[t]here is a vital connection between inherent tribal sovereignty and protecting [Native] children,"[7] a Tribe's continued existence is contingent upon the ability of the Tribe to protect its women and children.

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[5] U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 141 (Aug. 6, 2008) (hereinafter *"Violence Against American Indian and Alaska Native Women"*) https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

[6] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) (recognizing "'[t]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.'") (quoting 25 U.S.C. 1901(3)).

[7] Byron L. Dorgan et al., *Attorney General's Advisory Committee on American Indian and Alaskan Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 7 (Nov. 2014) http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

Nothing is more critical to a Tribal Government's ability to protect its citizens from violence than its jurisdiction. Jurisdiction allows Tribal Governments to make and shape the laws that command individuals to treat their women and children with dignity and respect.[8] Furthermore, a government's need to protect its citizens from abuse and sexual assault does not vary with the race, creed, or citizenship of the assailant; that is, a Tribe's inherent jurisdiction to protect its citizens is not contingent upon the race of the individual who commits the harm.

Dollar General, however, has asked this Court to drastically revise its past precedent and conclude that Indian Tribes may no longer exercise any form of their inherent civil jurisdiction over non-Indian conduct on tribal lands.[9] If adopted, Dollar General's proffered reversal would result in drastic consequences for Tribal Governments, and even more so, for their women and children. Non-Indians commit the majority of violent assaults on Native women and children,[10] and as a result, the creation of a new rule precluding the exercise of civil jurisdiction over non-Indians would greatly endanger the ability of Tribal Governments to protect their women and children, and ultimately, self-govern.

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[8] *See* Amnesty Int'l, *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA* 1 (2007), http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf ("As citizens of particular Tribal Nations, the welfare and safety of American Indian and Alaska Native women are directly linked to the authority and capacity of their nations to address such violence.").

[9] *See, e.g.*, Pet'r's Br. 19.

[10] 1999 Report, *supra*, at vi.

To be clear, Dollar General requests nothing less than the eradication of the civil jurisdiction the *Montana* Court elected to preserve. *See Montana v. United States*, 450 U.S. 544, 565–566 (1981). In 1978, this Court ruled that tribal courts could no longer exercise criminal jurisdiction over non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). However, since 1978, this Court has continued to affirm and uphold the *civil* jurisdiction of Tribal Governments "over the activities of non-Indians on reservation lands." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citing *Montana*, 450 U.S. at 565–566). It is true that, following *Montana*, the Court decided a handful of cases where the application of *Montana* did not compel a finding of civil jurisdiction over non-Indians. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001). These subsequent precedents, however, have not changed *Montana*'s fundamental precept—that is, the recognition that Tribal Governments retain civil jurisdiction over non-Indians where such jurisdiction "is necessary to protect self-government or to control internal relations." *Montana*, 450 U.S. at 564; *see also Hicks*, 533 U.S. at 359-62 (affirming *Montana*'s holding and acknowledging the continued "federal interest in encouraging tribal self-government"). All of the Court's subsequent decisions are in accord: *Montana* should not be construed to preclude the preservation of tribal self-government. Dollar General's requested reversal of *Montana*'s entire framework, therefore, must be dismissed.

First, Dollar General and its *Amici* (the "Dollar General *Amici*") seek to revise the *Montana* framework that preserves tribal civil jurisdiction over non-Indians who enter into "consensual relationships" with Tribes. *See Montana*, 450 U.S. at 565. Dollar

General's *Amici* suggest this Court should replace *Montana*'s "consensual relationships" with "clear and unequivocal consent," thereby limiting tribal jurisdiction to those instances where a non-Indian has given "clear and unequivocal consent to tribal jurisdiction." *See* Association of American Railroads *Amicus* Brief 8 (hereinafter "AAR Br."). This Court, however, has had numerous occasions in the last thirty-five years to clarify that *Montana*'s "consensual relationships" equates with "clear and unequivocal consent" and has repeatedly declined to do so. As described in detail below, substituting "consensual relationships" with "clear and unequivocal consent" would create an untenable situation where tribal courts would have to inquire as to whether a non-Indian perpetrator clearly and unequivocally expressed his consent to tribal jurisdiction before he sexually assaulted or abused a Native woman or child. Not only is this scenario implausible, it is unconscionable. Native women and children do not consent to being assaulted on tribal lands, yet this proffered revision of *Montana*'s "consensual relationships" would render their profound lack of consent a legal nullity.

Second, Dollar General further asks this Court to unconditionally "hold[] that tribal courts lack jurisdiction [] over tort claims" against non-Indians. Pet'r's Br. 19. Untethered to any particular aspect or element of the controlling *Montana* framework, this alteration would eliminate an entire function Tribal Governments currently perform to protect their women and children from sexual assault and abuse.

In sum, the NIWRC *Amici* agree fully with the arguments presented in Mississippi Choctaw Band of Indians' ("MBCI") brief—specifically that Dollar

General entered into a "consensual relationship" with MBCI and consequently, cannot circumvent the Tribal Court's jurisdiction with regard to the lawsuit two tribal members filed seeking a remedy for the sexual assault their child suffered while working in Dollar General's store on tribal lands. *See* Resp't's Br. 29-33. Furthermore, the NIWRC *Amici* concur with the United States in that the Court need not reach the question of *Montana*'s application to the present set of facts because the assault occurred on tribal trust lands and violated the bodily integrity of a tribal citizen, and as a result, MBCI's inherent jurisdiction over such conduct must be preserved.[11]

However, the novel arguments presented in this case, including the requested wholesale eradication of Tribes' inherent civil jurisdiction over non-Indians, as well as alterations to *Montana*'s "consensual relationships," compel the NIWRC *Amici* to write separately and convey their unique view on the disastrous consequences Tribal Governments—and therefore Native women and children— would suffer should the aforementioned revisions to past precedent be adopted.

Non-Indian perpetrated violence against Native women and children has threatened the continued existence of Indian Nations since its very inception. Initially, this violence was perpetrated by other nations, including the United States, as a military tactic of warfare designed to eradicate the existence of Indian Nations and Tribal Governments.[12] Although

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[11] *See* SG Cert Stage Amicus Br. 11 (arguing that an exercise of tribal authority need not fit within one of the two *Montana* circumstances where the regulated conduct occurs on land owned by the tribe).

[12] *See Violence Against American Indian and Alaska Native Women*, *supra*, at 67 (noting scholars have found that "violence

the warfare between the United States military and Indian Nations has concluded, the practice of non-Indian violence against Native women and children has not. An Indian Nation's continued existence is contingent upon the health and welfare of its women and children, and as a result, civil jurisdiction over non-Indians who assault Native women and children on tribal lands is a critical component to tribal self-government.

Eliminating this jurisdiction would threaten the continued viability of Tribal Governments and, ultimately, would call into question the legitimacy of contemporary American democracy.

ARGUMENT

I. Tribal Court Civil Jurisdiction over Non-Indians Who Commit Sexual Assault and Domestic Violence on Tribal Lands is Necessary to Sustain Tribal Self-Governance

[S]overeignty and safety are hand and glove. The sovereignty of Indian Tribes is connected to the safety of Native women. This connection is the natural relationship of a People to their nation. It is also the natural relationship of a government to protect and safeguard the lives of its citizens.

Former Chairwoman Terri Henry, Eastern Band of Cherokee Indians

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co.*, 480 U.S.

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against American Indian and Alaska Native women directly relates to historical victimization") (citations omitted).

at 14. A critical component of a Tribe's ability to self-govern is its tribal court. *See id.* at 14-15 ("Tribal courts play a vital role in tribal self-government"); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir. 2006) ("[T]ribal courts [are] critical to Indian self-governance") (citations omitted). As a result, a tribal court's jurisdiction "over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (citing *Montana*, 450 U.S. at 565–66); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on tribal lands).

It is true that this Court's decision in *Oliphant* restricted the ability of Tribes to exercise their inherent criminal jurisdiction to prosecute non-Indians who commit crimes on tribal lands. This Court subsequently clarified, however, that "[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, . . . *their civil jurisdiction is not similarly restricted.*" *Iowa Mut. Ins. Co.*, 480 U.S. at 14-15 (emphasis added) (citations omitted). This Court has repeatedly recognized Tribes' civil jurisdiction "over the activities of non-Indians on reservation lands" (*id.* at 18), and has only restricted Tribes' civil jurisdiction in a few limited circumstances. *See, e.g., Strate*, 520 U.S. at 459 (no tribal court jurisdiction over civil lawsuit where both plaintiff and defendant are non-Indians and the conduct from which the lawsuit arose took place on non-Indian owned fee land); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (concluding "the Tribe lacks the civil authority

to regulate the [non-Indian] Bank's sale of its [non-Indian owned] fee land"). Notably, the Court has never eliminated Tribes' civil jurisdiction over non-Indians who sexually assault tribal citizens on tribal lands.

At the core of this Court's preservation of tribal civil jurisdiction is tribal self-government. Despite having been presented with several opportunities to eliminate the exercise of tribal jurisdiction over non-Indians altogether, the Court has continually affirmed civil jurisdiction over non-Indians as an "inherent [tribal] power necessary to [sustain] tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982); *see also Montana*, 450 U.S. at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."). In furtherance of tribal self-government, *Montana* outlined two categories of non-Indian conduct over which Tribes retain the authority to exercise their inherent civil jurisdiction (also referred to as the "*Montana* exceptions").

First, the *Montana* Court confirmed that Tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

Second, the *Montana* Court went further, holding that a Tribe retains its:

> [I]nherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

Id. at 566. Nothing could be more critical to the political integrity, the economic security, or the health and welfare of a Tribe than the ability of its citizens to turn to their government's courts for protection from sexual assault and domestic violence. Tribal tort law, therefore, is a critical component of the protection Tribal Governments must be able to continue to provide their citizens.

The *Montana* Court did not articulate a standard that can be picked apart word by word and applied in isolation. Instead, *Montana* provides a carefully crafted judicial framework that ensures the rights of non-Indians are properly balanced with the inherent rights of Tribal Governments to self-govern and protect their citizens. *See id.* at 564-66. However, in an attempt to create a divide where none exists, Dollar General purports to limit its arguments to the "first" *Montana* category, asserting that MBCI has "abandoned any claim that jurisdiction in this case can be supported under the second exception." Pet'r's Br. 48.

The actual language in Dollar General's brief, however, reveals that its arguments contain no such limitation and are instead incredibly expansive. Dollar General has asked this Court to reach "the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*" (Pet'r's Br. 24 (citations omitted)) and suggests this Court should

conclude that Tribes retain no inherent civil jurisdiction over non-Indian conduct on tribal lands absent congressional legislation. *See id.* at 58. This is not a debate about Montana's "first exception." This is a debate about whether *Montana*'s entire framework should be replaced with *Oliphant*. The NIWRC *Amici*, therefore, will not be limited to arguments about *Montana*'s first exception while Dollar General argues for the abdication of both.[13]

When applied as a whole, this Court's decision in *Montana* compels the conclusion that Indian Tribes have retained their inherent civil jurisdiction over

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[13] Even if Dollar General had confined its argument to *Montana*'s first exception, the Court would not be precluded from considering NIWRC *Amici*'s arguments under the second, as this Court often considers arguments that are presented in *amicus* briefing alone. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing question of retroactivity even though question was raised only in *amicus* brief); *Mapp v. Ohio*, 367 U.S. 643, 646, n. 3 (1961) (applying exclusionary rule to the States even though the application of the rule was only urged by *amicus curiae*); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (noting the Court "has not always confined itself to the set of issues addressed by the parties."). Furthermore, "[o]n a number of occasions, this Court has considered issues waived by the parties below and in the petition for *certiorari* because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991). Here, NIWRC *Amici*'s assertion that civil jurisdiction to protect Native women and children from domestic violence and sexual assault is essential to the preservation of tribal self-government is entirely subsumed by, and intimately bound up with, Dollar General's proposed substitution of *Oliphant* for the entire *Montana* framework, and as a result, NIWRC *Amici*'s argument concerning *Montana*'s second category of jurisdiction commands this Court's consideration.

non-Indian perpetrators of violence against tribal members on tribal lands.

A. Montana's "Consensual Relationships" Standard Does Not Exempt Non-Indian Perpetrators of Sexual Assault and Domestic Violence from Tribal Court Jurisdiction

NIWRC *Amici* agree with MBCI that the jurisdictional elements under *Montana*'s first category of jurisdiction are more than satisfied and that the Tribe retains jurisdiction over Dollar General as a result of the consensual relationship Dollar General willingly entered into with the Tribe. *See* Resp't Br. 29-33. That is, in instances where the assault is perpetrated against a tribal member during the course of his employment with a non-Indian employer licensed to do business on tribal lands, as is the case here, *Montana*'s first "prong involving a consensual relationship [is satisfied because] there is a double or even triple element of consent." *Dubray-Cordier v. St. Francis Mission*, CA 2004-02, *5 (Rosebud Sup. Ct. 2004); *see id.* (noting that the "tribal business license granted" by the Tribe constitutes one qualifying act of consent, and further that "the employer-employee relationship [constitutes] the quintessential consensual relationship.").[14] Consequently, where "the torts gr[o]w directly from the employer-employee relationship [and where the] alleged[] abuse [takes place] in the context of an employee-employer Relationship" (*id.*), the exercise of tribal jurisdiction over the perpetrator and/or

[14] The Rosebud Supreme Court's decision is available at: http://lgdata.s3-website-us-east-1.amazonaws.com/docs/3144/860906/dubray.pdf.

non-Indian employer is well within the bounds of *Montana*'s first category.[15]

Dollar General and its *amici*, however, seek to transform *Montana*'s "consensual relationships" element into a requirement that Tribes establish "clear and unequivocal" or "express" consent before exercising any form of civil jurisdiction over non-Indians. *See* AAR Br. 6-28; Oklahoma Attorney General et al., *Amicus* Brief (hereinafter "Okla. Br.") 16. This Court has never required "express consent" nor has it required anything close to consent that could be characterized as "clear and unequivocal."

Instead, this Court has held that a nonmember consents to tribal jurisdiction "either expressly *or by his actions*" (*Plains Commerce Bank*, 554 U.S. at 337 (emphasis added)), a standard that appropriately reflects the reality of many tribal communities where non-Indian perpetrators of domestic violence and sexual assault express their consent through willful entry and subsequent purposeful acts of violence—not with a written or spoken word. The conduct of non-Indian perpetrators evidences consent because these non-Indians willfully elect to enter tribal lands (*see Merrion*, 455 U.S. at 147), and as a result, subject themselves to tribal jurisdiction before they decide to physically assault a Native woman or child.

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[15] Another "quintessential consensual relationship" is a marriage and/or dating relationship. For Tribal Governments, the exercise of civil jurisdiction over a non-Indian spouse is a critical function of self-government, as the majority of Indian women describe themselves as in a relationship with a non-Indian. *See* U.S. Census Bureau, 2010 Census Brief, *Households and Families: 2010* 32 (2012), http://www.census.gov/2010census/news/pdf/20120425_household_slides.pdf.

This Court should affirm its prior holding in *Plains Commerce Bank* that to establish tribal civil jurisdiction over non-Indians under the *Montana* framework, Tribes must demonstrate "commensurate consent"—not "express" or "clear and unequivocal." *Plains Commerce,* 554 U.S. at 337. Merriam-Webster defines "commensurate" as "equal in measure or extent" and "corresponding in size, extent, amount, or degree."[16] This comports with the conclusion that to establish a "consensual relationship" under *Montana*, "the [] regulation imposed by the Indian tribe [should] have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Here, the provision of a tort remedy in tribal court bears a direct nexus to the "consensual relationship" a perpetrator forms with a Tribal Government when he enters tribal lands and assaults a tribal member. Tort law is, by definition, "[a]n obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." W. Page Keeton et al., *Prosser and Keeton on Torts* § 30 at 164 (5th ed. 1984). Domestic and sexual violence constitute "unreasonable risk[s]," and, accordingly, a Tribal Government's use of tort law to regulate such conduct is entirely commensurate with the risk the conduct imposes to the Tribe's body politic.

Furthermore, the provision of a tort remedy in tribal court for survivors of domestic violence and sexual assault is entirely commensurate with the four cases

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[16] *Commensurate,* Merriam-Webster.com, http://www.merriam-webster.com/dictionary/commensurate (law visited Oct. 14, 2015).

the *Montana* Court cited in articulating its first category. *See Plains Commerce Bank*, 554 U.S. at 332 (noting that this Court "cited four cases in explanation of *Montana*'s first exception.") (citations omitted). Each of these four cases "involved regulation of non-Indian activities on the reservation that had a discernible effect on the tribe or its members" or involved an area "where the tribe has a significant interest in the subject matter." *Id.* (citations and quotation marks omitted). As described in greater detail below, sexual assault and domestic violence against Native women and children have more than a "discernible effect on the tribe [and] its members." *Id.* Indeed, the effect has been well-documented and characterized as a crisis.[17] Therefore, when it comes to protecting Native women and children from sexual assault and domestic violence, Tribal Governments have a great deal more than "a significant interest in the subject matter."

Sexual assault is an act of violence that can take place only in the absence of consent. A perpetrator that seeks to violate the sovereignty of a child's body can hardly be expected to consent to the jurisdiction of the child's Tribal Government. The proffered alteration of *Montana*'s "consensual relationships," therefore, would all but eradicate tribal civil court jurisdiction over non-Indians who commit sexual assault and domestic violence on tribal lands, as there is no evidence to suggest that non-Indians committing such acts of violence would ever "expressly" state their consent to tribal jurisdiction. "Express consent" and "clear and unequivocal consent" cannot be construed

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[17] Dorgan et al., *supra*, at 47, 222 (noting failed policies and laws as contributing factors to the public safety crisis in Indian country).

in a manner that complies with *Montana*'s fundamental tenet: tribal self-government must be preserved. Dollar General's arguments must be dismissed.

B. Violence Against Native Women and Children Perpetrated by Non-Indians on Tribal Lands Imperils the Political Integrity, Economic Security, and Health and Welfare of Tribes

Under the framework established in *Montana*, a Tribe's civil jurisdiction to adjudicate tort claims brought against a non-Indian defendant is at its height when the underlying tortious conduct involves sexual assault and/or domestic violence against a tribal citizen. The necessity for tribal jurisdiction is particularly acute when the violence is directed towards children, as in the present case, because Native children "are the future of American Indian and Alaska Native communities [but are currently] destroyed by relentless violence and trauma."[18] The current levels of violence, therefore, "imperil the subsistence . . of the tribal community" (*Plains Commerce Bank*, 554 U.S. at 319), and as a result, the ability of Tribal Governments to regulate the violence through the provision of tort remedies in tribal courts is necessary to preserving the political integrity of the Tribe and the welfare of its citizens.

Data produced by the Federal Government indicates that Native women are raped at the highest per capita rates in the United States.[19] Widespread, commonplace sexual and domestic violence have taken a toll on Native communities, leaving nations of people

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[18] Dorgan et al., *supra*.

[19] 1999 Report, *supra*, at 3.

that suffer from unspeakable levels of trauma which in turn leads to high rates of maladies such as mental illness, addiction, and even physical ailments such as chronic heart, lung, and liver disease.[20] Victimization, and the unresolved trauma that follows, are directly linked to significant disparities in both mental and physical health.[21] These widespread disparities directly affect and threaten – indeed, imperil – the health and welfare of Tribal Nations and their citizens.

Lower courts considering the second category of *Montana* jurisdiction have found that "[c]onduct reasonably likely to result in violence on tribal lands sufficiently threatens tribal health and welfare to justify tribal regulation." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 939 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011); *see also United States v. Nichols*, No. CR 14-30038-MAM, 2014 WL 4185360, *5 (D.S.D. Aug. 20, 2014) (under *Montana*, tribal courts may exercise jurisdiction over non-Indians who commit acts of domestic violence in order "to protect tribal health and safety interests.") (citation omitted). Here, the violence is more "than likely to result"—it has already occurred and continues to occur at staggering rates that render tribal jurisdiction an absolute necessity.

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[20] *See* Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242, 244-45 (2007).

[21] *See* J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Progress in Brain Research 2 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/.

1. Native Women and Children Are More Likely to Be Assaulted and Abused than any Other Population, and the Majority of These Assaults Are Committed by Non-Natives

In 1999, the Bureau of Justice Statistics released *American Indians and Crime*, a report that detailed the wide disparities that Native people experience within the criminal justice system ("1999 Report").[22] Compiling data from a variety of federal sources, the 1999 Report concluded that "American Indians experience per capita rates of violence which are more than twice those of the U.S. resident population."[23]

The 1999 Report also indicated that the majority of these assaults are inflicted by non-Indians.[24] That is, the report noted that "[a]t least 70% of the violent victimizations experienced by American Indians are committed by persons not of the same race — a substantially higher rate of interracial violence than experienced by white or black victims."[25] Just five years later, in 2004, the Bureau of Justice Statistics released a companion report ("2004 Report"), which confirmed many of the findings from the 1999 Report.[26] For example, the 2004 Report concluded that

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[22] 1999 Report, *supra*.

[23] *Id.* at v.

[24] *Id.* at vi.

[25] *Id.*

[26] *See* Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, NCJ 203097 (2004) (hereinafter "2004 Report").

"approximately 60% of American Indian victims of violence described the offender as white."[27]

Numerous other studies have confirmed and expounded upon the continued crisis Tribal Governments face in protecting their women and children. In 2000, the National Institute of Justice released a study with findings from the National Violence Against Women Survey. In that study, American Indian and Alaska Native ("AI/AN") women reported being raped at a rate significantly higher than other races of women – for instance, 34.1% of AI/AN women report having been raped, as opposed to 17.9% for white women.[28] In 2011, the Centers for Disease Control released a report on the National Intimate Partner and Sexual Violence Survey, concluding that "more than one quarter of women (26.9%) who identified as American Indian or Alaska Native reported rape victimization in their lifetime."[29] The same survey report concluded that 46% of AI/AN women have been raped or have experienced physical violence and/or stalking by an intimate partner in their lifetime.[30] In 2014, the Centers for Disease Control released a study indicating that 55% of AI/AN women have experienced

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[27] *Id.* at v.

[28] Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey* 14, NJC 210346 (2006).

[29] Michele Black et al., National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3 (2011).

[30] *Id.*

sexual violence other than rape.[31] In short, NIWRC *Amici* are unaware of a single study on rape and domestic violence that concludes Native women and children do not experience the highest rates of domestic violence and sexual assault in the United States.

Statistics on violence against Native children reveal that they are targets of the same widespread violence. A report by the Indian Country Child Trauma Center concluded that Native youth are 2.5 times more likely to experience trauma when compared to their non-Native peers.[32] Further, AI/AN youth experience high rates of child abuse: 15.9 per one thousand compared to 10.7 for white youth.[33] The crisis of violence against Native children cannot be underestimated. "American Indian and Alaska Native children [] suffer exposure to violence at rates higher than any other race in the United States."[34]

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[31] Matthew Breiding et al., Centers for Disease Control and Prevention, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 Morbidity & Mortality Wkly. Rep. 1, 5 (2014).

[32] BigFoot et. al., *supra*, at 2.

[33] Neelum Arya & Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, 1 Policy Brief and Ethnicity Series 1, 5 (2008), http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf.

[34] Dorgan et al., *supra*, at 6.

2. Unresolved Widespread Trauma in Tribal Communities Imperils the Health and Welfare of Tribes

Experiencing rape or other forms of abuse is the most common cause of developing a mental disorder known as post-traumatic stress disorder ("PTSD").[35] Because Native women and children experience a high rate of rape and abuse, they accordingly suffer from high rates of PTSD. PTSD is "one of the most serious mental health problems faced by AI/AN populations."[36] In fact, the rate of PTSD in Native American adults is 4.4 times the national average.[37]

As a result of these elevated levels of violence in their homes and communities, Native youth face significant challenges in preparing to one day succeed the current leaders in their Tribal Governments. A recent Department of Justice Task Force on Ending Violence Against Children in Tribal Communities studied rates of violence and PTSD for Native children, concluding that AI/AN "children experience PTSD at the same rates as veterans returning from Iraq and Afghanistan and triple the rate of the general population."[38] The crisis for Tribal Governments is acute; their next generation of tribal leaders currently

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[35] Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 Soc. Psychiatry & Psychiatric Epidemiology 417 (2014).

[36] *Id.* at 418.

[37] Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 Nursing Res. & Prac. 1, 3 (2013).

[38] Dorgan et al., *supra*, at 38.

suffers from rates of violence and trauma equivalent to an army returning from warfare.

PTSD, however, is not the inevitable result of trauma. Instead, PTSD is a consequence of *unresolved* trauma – that is, trauma for which there has been no adequate intervention.[39] Unresolved trauma is the leading cause of PTSD, which in turn burdens the victim with a wide variety of mental and physical maladies.[40] These maladies can generally be grouped into three categories: mental disorders, addiction disorders, and physical disorders.[41] American Indians suffer from incredibly high rates of the various health and mental disorders known to result from PTSD, diseases that in many tribal communities result in truncated life expectancies for American Indians that end long before the national average.[42] Given that the link between these diseases and PTSD is well-established, the connection between the widespread violence and the current health crisis in tribal communities cannot be questioned.

Furthermore, the high rates of suicide in the Native youth population cannot be separated from the extraordinarily high rates of abuse they experience. "In 2001, the suicide rates for AI/AN youth were three

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[39] Cheryl Regehr & Tamara Sussman, *Intersections Between Grief and Trauma: Toward an Empirically Based Model for Treating Traumatic Grief*, 4 Brief Treatment & Crisis Intervention 289, 294 (2004).

[40] *See, e.g.*, Bremner et al., *supra*, at 2.

[41] *See, e.g.*, Sareen et al., *supra*, at 243.

[42] Sharmila Devi, *Native American Health Left out in the Cold*, 377 Lancet 1481 (2011) ("Native Americans and Alaskan Natives born today have a life expectancy that is 5.2 years less than the general population . . . .").

times greater than for Caucasians of similar age (19)."[43] In the Northern Plains and Alaska, however, the rates of Native youth suicide are four to five times higher than suicide mortality among white youth.[44] The unrivaled level of violence in tribal communities affects not only the youth, but the entire population; American Indians commit suicide at rates far exceeding those in the general population.[45] Numerous studies have likewise concluded that Native women who are victims of domestic violence or sexual assault are at a high risk for depression and suicide.[46]

3. Unresolved Widespread Trauma in Tribal Communities Imperils the Economic Security of the Tribe

The high rates of unresolved trauma in tribal communities have a direct effect on the economic security of Tribes, as unresolved trauma often prevents survivors from maintaining employment and supporting their families.[47] People suffering from unresolved trauma experience disrupted income or reduced earning power – and these consequences have

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[43] BigFoot et. al., *supra*, at 3.

[44] Mose A. Herne et al., *Suicide Mortality among American Indians and Alaska Natives, 1999-2009*, 104 Am. J. Pub. Health 336 (2014).

[45] *Id.* (concluding death rates from suicide are 50% higher for Natives than non-Natives).

[46] *See, e.g.*, Jamila K. Stockman et al., *Intimate Partner Violence and Its Health Impact on Disproportionately Affected Populations, Including Minorities and Impoverished Groups*, 24 J. Women's Health 62, 75 (2015).

[47] Rebecca M. Loya, *Rape as an Economic Crime: The Impact of Sexual Violence on Survivors' Employment and Economic Well-Being*, 30 J. Interpersonal Violence 2793 (2014).

"implications for survivors' economic well-being in the months or years following the assault."[48]

Although Tribal Governments have yet to extensively study how their economies are impacted by the high rates of trauma their members suffer, one study in Michigan concluded that the after-effects of rape in 1996 cost the State more than $6.5 billion.[49] Given that the rates of violence against Native women and children are higher per capita than the rates of violence against women and children in the non-Native population, it is clear that the economic impact on tribal economies is equally, if not more, profound.

4. Unresolved Widespread Trauma in Tribal Communities Imperils the Political Integrity of the Tribe

On October 25th, 2008, I was beaten and choked. I remember this date because it was three hours before a tribal council meeting. I attended that council meeting with finger and handprints on my neck from being choked. At the council meeting I kept my head down with my hair pulled forward to try and keep the marks from being seen. It was at that point that I realized the violence didn't just threaten me and my children; it threatened my ability to lead my Nation. No woman should be forced to lead a government that has been stripped of the jurisdiction necessary to protect her people.

Former Councilwoman Cherrah Giles, Muscogee Creek Nation

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[48] *Id.*

[49] Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. Interpersonal Violence 773 (2002).

Political integrity is contingent upon the provision of protection for members of the body politic, and consequently, a Tribal Government cannot maintain its integrity when perpetrators are allowed to escape accountability for the harm they have caused to the community.

Protecting Native women is crucial to the preservation of Tribal Government. Women give life to the next generation of tribal citizens and leaders, and in many instances, are the leaders that comprise Tribal Government. For instance, of the seventeen elected leaders that serve on the Tribal Council for MBCI, over half (nine) are women.[50]

Likewise, the political integrity of the Tribe is significantly imperiled when the harmful conduct is directed towards the Tribe's children, as "'[t]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) (quoting 25 U.S.C. 1901(3)). Tribal jurisdiction to protect Native children, therefore, protects "not only the interests of individual Indian children and families, but also of the tribes themselves." *Id.* As many Tribal Governments recognize, "there is no doubt that [Native] children are in jeopardy from abuse." *John Doe BF v. Diocese of Gallup, et al.*, No. SC-CV-06-10, *15 (Nav. Sup. Ct. Sept. 9, 2011).[51] Native children who suffer from abuse withdraw from their tribal community. *See id.*

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[50] Choctaw Tribal Council, http://www.choctaw.org/about MBCI/council/ (last visited Oct. 15, 2015).

[51] The Navajo Nation Supreme Court's decision is available at: http://www.navajocourts.org/NNSC2011/11JohnDoeBFvDiocese G.pdf.

(noting that Native boys who are sexually abused suffer "acute effects of withdrawal and loss of contact with community when exposed to such abuse") (citations omitted). The loss of children "constitutes a serious threat to [Indian Tribes'] existence as ongoing, self-governing communities" (*Holyfield*, 490 U.S. at 55, n.1) (internal citations and quotation marks omitted), and consequently, tribal jurisdiction to protect Native children from abuse and sexual assault "is necessary to protect self-government[.]" *Montana*, 450 U.S. at 564.

The threat to the Tribe's political integrity in this instance is not diminished by the fact that this particular case involves only one documented incidence of sexual assault. The preservation of political integrity cannot be measured in response to an isolated assault. Instead, the preservation of political integrity must be considered within the context of the cumulative effect of repeated, unresolved trauma in tribal communities. The cumulative effect of violence on the tribal community is particularly acute in the workplace. *See Marathon Oil Co. v. Johnston*, No. 03-CV-1031-J, 2004 WL 4960751, *7 (D. Wyo. June 1, 2004) ("[t]ribal courts [] have an overwhelming interest in the workplace safety of corporations operating on tribal land because, invariably, significant numbers of tribal members may constitute the relevant workforce.").

Moreover, the documentation of one incident of sexual assault demonstrates a high likelihood that the perpetrator has committed many more. Studies of sex offenders reveal that it is unusual for a perpetrator to assault but one single victim. In one study, men who committed rape admitted to, on average, having raped

over five victims.[52] Tribal Nations, unfortunately, know how common it is for a perpetrator to have multiple victims. For example, a U.S. Senate investigative committee reported that in the Hopi Tribe, a single non-Indian Bureau of Indian Affairs teacher (John Boone) was estimated to have molested over 140 young male victims between 1979 – 1987.[53] Thus, where a single tort claim is indicative of a larger pattern of conduct that threatens the health and welfare of a Tribal Nation, *Montana*'s second category is satisfied and a Tribe may exercise its civil jurisdiction over the non-Indians who exhibit the harmful conduct. *See, e.g., Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999) (finding tribal jurisdiction by acknowledging that the pending action is "not the only wrongful death action" for malpractice that a tribal member has suffered, and consequently, the malpractice at issue "may jeopardize their very ability to survive as a people."). Here, the cumulative effect of violence against Native women and children "jeopardize[s] their very ability to survive as a people." *Id.*

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[52] David Lisak & Paul M Miller, *Repeat Rape and Multiple Offending among Undetected Rapists*, 17 Violence & Victims 73 (2002).

[53] Special Comm. on Investigations of the Select Comm. on Indian Affairs, United States Senate, *Final Report and Legislative Recommendations*, S. Rep. No. 101-216 at 10 (1989).

5. Tribal Tort Law Is a Critical Self-Government Solution to the Crisis Imposed by Unresolved Trauma

The Cherokee elders and wise ones say that we have always been here. We will always be here. It is believed that we were given our home here in these mountains by the Creator. Since it was He who gave it to us, only He could take it from us. So did I ever think of leaving Cherokee? No. Not once. I will never leave my home.

Billie Jo Rich, Eastern Band Cherokee Survivor of non-Indian perpetrated domestic violence (in response to the question of why she never left her home to seek justice in state court)

The current crisis of non-Indian violence against Native women and children on tribal lands renders tribal tort law a critical and essential element of tribal self-government. *See Garfield v. Sherman Motor Inn*, No. 418, 2006 WL 7137863, *2 (Fort Peck C.A. Sept. 25, 2006) ("An important component of tribal self-government is the regulation of tortious behavior on the reservation as well as the adjudication of disputes arising on the reservation."). Without tribal tort law, Tribal Governments cannot protect the political integrity, economic security, or health and welfare of their Nations.

Indeed, the purpose of tort law is to enable governments to circumscribe (regulate) conduct that threatens the health and welfare of their citizens. *See* Oliver Wendell Holmes, Jr., *The Common Law* 114 (1881) (Tort law allows governments to ensure "the protection of the individual [citizen] from injury. . . ."); *Budgetel Inns, Inc. v. Micros Systems Inc.*, 8 F. Supp. 2d 1137 (E.D. Wis. 1998) ("[T]ort law protects society's interest in human life, health, and safety."); *see also*

Keeton et al., § 1, at 2. Nothing, therefore, could be more inherent to a Tribe's power as a sovereign engaged in self-government than the adjudication of civil disputes arising from tortious conduct targeted at its own citizens on tribal lands. *See Salish Kootenai Coll.*, 434 F.3d at 1140 ("The Tribes' system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its [sic] members."). Indeed, the adjudication of "[d]omestic violence torts offer[s] the potential to deter abusers from engaging in abusive conduct."[54]

And when the tort at issue involves a sexual assault against a young tribal member, tribal "courts have a duty, in *parens patriae*, to ensure allegations of harm to our children are fully heard . . . ." *Diocese of Gallup, et al.*, No. SC-CV-06-10 at 16; *see also id.* (concluding that Tribal Court has jurisdiction when Montana elements are met to adjudicate tort dispute brought by a young tribal citizen against a non-Indian defendant who sexually assaulted the youth on tribal lands). Indeed, the "[a]djudication of such matters by any nontribal court [] infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co.*, 480 U.S. at 16. It follows that "tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities."[55]

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[54] Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 Kansas L. Rev. 695, 751 (2014).

[55] U.S. Att'y Gen. Janet Reno, *A Federal Commitment to Tribal Justice Systems: Litigation practice and a series of projects of the U.S. Department of Justice support the federal government's longstanding policy of self - determination for Indian tribes*, 79 Judicature No. 3 (1995), Tribal Court Clearinghouse (Oct. 6, 2015), http://www.tribal-institute.org/articles/reno.htm.

Despite the assertions of Dollar General *Amici*'s to the contrary, state courts are not a sufficient substitute for the tribal forum where the sexual assault or violence occurred and where the survivor lives. The Oklahoma Attorney General's brief touts that "[s]tate and federal courts have always provided an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not." Okla. Br. 17. A brief review of history reveals this is far from true. Several states, including Mississippi, previously prohibited Indians from testifying in state court,[56] and for a significant period of time, most state courts refused to acknowledge any civil tort remedies for women who suffered abuse at the hands of a spouse.[57] State courts have not "always" provided an "adequate and fair forum for the resolution" of tort claims brought by Native women and children for the abuse they have suffered.

For many Native women, forcing them to take their claims to state court will preclude them from filing their claims at all, as traveling to the nearest "state court entails severe inconvenience" that they cannot economically and emotionally bear after surviving a

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[56] *See, e.g.*, 1824 Miss. Laws 130; 1837 Ga. Laws 279; 1843 Ala. Acts 600-01.

[57] *See, e.g.*, *Bradley v.* State, 1 Miss. 156, 1824 WL 631, *1 (Miss. 1824) (upholding husband's entitlement to exercise the right of moderate chastisement); *Joyner v. Joyner*, 59 N.C. 322, 1862 WL 892, *3 (N.C. 1862) declaring that "the law gives the husband to use [illegible]h a degree of force as is necessary to make the wife behave h[illegible]lf and know her place"); *Skinner v. Skinner*, 5 Wis. 449, 1856 WL 3888, *3 (Wis. 1856)

violent assault.[58] In some instances, the nearest state court off tribal lands is located three to five hours away.[59] It is unconscionable to require Native women and children to drive three to five hours to file a civil action simply because their perpetrator never "expressly consented" to tribal jurisdiction before sexually or physically assaulting them.

Nor can Native women and children rely on the Federal Government to criminally prosecute offenders, as the Federal Government declined to prosecute sixty-seven percent of the sexual assaults committed against American Indians on tribal lands from 2005 to 2009.[60] Tribal Governments would prosecute these offenders if they could, but as a result of this Court's decision in *Oliphant*, it has been nearly forty years

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[58] Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 Am. U. L. Rev. 1627, 1649 (2006).

[59] For instance, a citizen of Navajo Nation living in Kayenta, Arizona, would have to travel 173.1 miles (2 hours, 48 minutes), to the nearest state court for Arizona's Navajo County, located in Holbrook, Arizona, or the second nearest state court in Navajo County, located in Show Low, Arizona, a distance of 220.2 miles (3 hours, 36 minutes), as opposed to filing her complaint in the Navajo Nation's Kayenta Judicial District Court, located in Kayenta, Arizona. A citizen of the Duckwater Shoshone Tribe living in Duckwater, Nevada, would have to drive 303 miles (4 hours, 57 minutes) to arrive at the State's Fifth Judicial District Court, located in Pahrump, Nevada, as opposed to the tribal court located in Duckwater. A citizen of the Boise Forte Band of Chippewa living in Nett Lake, Minnesota would have to travel 124.1 miles (2 hours, 7 minutes) to arrive at the nearest state court in Duluth, as opposed to filing her complaint in the tribal court in Nett Lake.

[60] U.S. Gov't Accountability Office, GAO-11-167R, *U.S. Dep't of Justice Declinations of Indian Country Criminal Matters* 9 (2010), http://www.gao.gov/assets/100/97229.pdf.

since Tribal Governments have been permitted to exercise their inherent jurisdiction to criminally prosecute non-Indian perpetrators of sexual assault and domestic violence on tribal lands. Consequently, for many Native women and children survivors, a civil lawsuit in tribal court offers the only remedy available for the wrongs they have suffered.

Moreover, the fact that tribal tort law reflects the values of the survivor's tribal community is in no way a valid basis for discrediting the legitimacy of the survivor's tribal court. Dollar General and its *Amici* decry that subjecting non-Indians to tribal court jurisdiction is an injustice because tribal "customs [and] traditions [] may factor prominently in civil actions litigated in tribal court." AAR Br. 25. This is, however, the very definition of "law."[61] State courts are no different from tribal courts in that the laws they espouse reflect the culture, customs, and traditions of the community in which they exist. The suggestion that tribal courts *alone* must demonstrate that their communities' customs in no way influence their courts' adjudication of tort disputes arises from an archaic belief that when compared to non-Indian customs, tribal customs are somehow inferior. They are not. If all courts were required to remove cultural influences from their adjudication of tort disputes, *no* court in the United States (tribal, state, or federal) would be qualified to adjudicate tort disputes.

Dollar General further asserts that "tort law creates particularly difficult problems of notice and consent" because "nonmembers must be provided clear notice of

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[61] *Law*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/law (last visited Oct. 14, 2015) (defining "law" as "a binding *custom* or practice of a community") (emphasis added).

what activities will subject them to tribal authority and what the governing law requires of them." Pet'r's Br. 50-52. Dollar General points to no jurisdiction where an employer holds a reasonable expectation that the negligent supervison of an employee who sexually assaults another employee during the course of employment could not subject the company to tort liability under the law, and consequently, Dollar General's concerns about "notice and consent" are based on undefined hypotheticals that have no relevance to the Court's current consideration of the inherent jurisdiction of Tribes to protect their citizens from sexual assaults on tribal lands.

Ultimately, when the tort committed on tribal lands is one of domestic violence or sexual assault against a tribal citizen, the ability of the Tribal Government to provide a civil remedy becomes critical to the Tribe's ability to self-govern. *See Garfield*, 2006 WL 7137863, at 4. Tribal citizens "look to their government for protection." *Id.* And consequently, "[i]f a government cannot promote the safety of Tribal members by regulating [the tortious] conduct of [non-Indians, including] on-reservation businesses, both the safety of the members and the legitimacy of the government are potentially adversely impacted." *Id.* Governments lose their ability to self-govern when they cannot protect the basic foundation of their citizens' health and welfare. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) ("Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.").

If this case does not present the requisite circumstances to justify tribal jurisdiction under *Montana*'s second category, it is hard to imagine a case that could, aside from actual warfare. Then again, contemporary violence against Native women and children is a continuation of what originally began as warfare. In the 21st Century, however, it is more proper to assume that the "Court in *Montana* meant [the public health and welfare] prong of its proviso to have potential consequences in the real world" and not in centuries past. Pet. App. 88. For the second category to have "consequences in the real world," it must be interpreted as preserving the inherent jurisdiction of Tribal Governments to protect their women and children from sexual assault on tribal lands, even where responsibility for the violence can be traced to a corporate, non-Indian defendant.

II. Congress Alone Has the Constitutional Power to Limit or Enhance Indian Tribes' Exercise of their Inherent Jurisdiction

If the power to exercise civil jurisdiction over non-Indians "is to be taken away from [Tribes], it is for Congress to do it"—not this Court. *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). Congress, however, has repeatedly refused to remove the jurisdiction that Dollar General and its *Amici* now ask this Court to eliminate. *See Iowa Mut. Ins. Co.*, 480 U.S. at 18 ("Congress has amended the diversity statute several times since the development of tribal judicial systems, but it has never expressed any intent to limit the civil jurisdiction of the tribal courts."); *see also* F. Cohen, Handbook of Federal Indian Law 253 (1982 ed.).

This Court should refrain from eradicating the jurisdiction that Congress has refused to eliminate. Nothing is more critical to the preservation of tribal self-government than the Tribe's ability to protect the women and children who create, and constitute, the Tribe's future leaders and government. A rule that diminishes tribal jurisdiction to insulate non-Indian perpetrators from liability for their violent conduct on tribal lands has no place in a post-colonial American democracy.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Statements of *Amici Curiae*

The following organizations respectfully submit this brief as *amici curiae* in support of respondents.

ADABI is a Navajo Nation not-for-profit organization incorporated in 1987 (http://www.adabi.org/). ADABI is a 24 hour crisis program serving victims of domestic violence and sexual assault rape victims on the Navajo reservation. ADABI's mission is to collaborate with communities within the Chinle Agency and surrounding areas. ADABI offers direct victim services and promotes prevention of domestic violence and sexual assault while fostering safety and healing.

Airline Ambassadors International ("AAI") is a Washington, D.C. not-for-profit organization incorporated in 2003 (http://airlineamb.org). AAI has worked directly with the United Nations in supporting their UN Millennium Goals. AAI was the first not-for-profit to sign onto the ECPAT Code of Conduct to ensure the work in Disaster Relief and Sustainable Development around the world carries a safe structure for survivors of disasters. Since the Haiti Earthquake in 2011, AAI has committed to train Airline Personnel in the signs of Human Trafficking on Commercial Airlines around the U.S. and Internationally. AAI has held and testified in the first Congressional Hearing to brief the Airline Corporations, on the incidents and dangers in Human Trafficking on Commercial Airlines. AAI has held over 21 Human Trafficking Awareness Trainings in the United States and abroad. AAI has attended two Interpol conferences in Europe and continues to support many non-profits dedicated to educate

and support victims and survivors of Human Trafficking.

The **Akiak Native Community OVW Program** is an Akiak Native Village not-for-profit organization created in 2008. The Program helps domestic violence and sexual assault victims with support for appropriate services. The Program also works with tribal courts to enforce tribal laws and protective orders. The Program promotes: education, prevention, and intervention.

The **Alaska Native Women's Resource Center** ("ANWRC") is an Alaskan not-for-profit organization incorporated in 2015. Having just recently incorporated, the statewide resource center for Alaska Native peoples will collect and disseminate best Indigenous practices addressing domestic violence, sexual assault, sex trafficking and child abuse as well as relevant policies and laws that affect the Alaska Native peoples and their federally recognized Tribal organizations and programs. ANWRC will support and empower rural providers and first responders and the tribal organizations and programs addressing these issues. ANWRC will provide individualized training and support relevant to our diverse Indigenous population of members in the 229 federally recognized Tribes within Alaska.

The **Alipato Project** is a California not-for-profit organization incorporated in 2012 (http://alipato project.org). The Alipato Project is the first non-profit organization in California to provide legal representation to resistors of domestic violence suing their batterers in civil court for damages.

American Indians Against Abuse ("AIAA") is a Wisconsin not-for-profit incorporated in 1991. AAIA is a statewide sexual assault and domestic violence tribal coalition serving Wisconsin's eleven Tribes and member programs by providing education, support, and technical assistance to enhance and strengthen the response to victims of domestic violence, sexual assault, dating violence, and stalking. AIAA's trainings, community awareness, and collaborative events are designed to be reflective of and have relevance to our local, regional, and nationwide indigenous people and culture.

Anishnaabek Community and Family Services - Advocacy Resource Center is a Sault Ste. Marie Tribe of Chippewa Indians not-for-profit organization incorporated in 1989. The mission of the Anishnaabek Community and Family Services - Advocacy Resource Center is to provide comprehensive, culturally appropriate and trauma informed direct services to victims and survivors that promote individual dignity and self-sufficiency through supportive advocacy and assistance.

The **Arizona Coalition to End Sexual and Domestic Violence** is an Arizona not-for-profit organization incorporated in 1980 (www.acesdv.org). The Arizona Coalition Against Domestic Violence was formed in 1980 so that concerned citizens and professionals could unite in a statewide organization to end domestic violence. In 2013, the Coalition became the designated dual coalition to address both sexual and domestic violence thus becoming the Arizona Coalition to End Sexual and Domestic Violence. The Coalition's mission is to lead, advocate, educate, collaborate, to prevent and end sexual and domestic violence in Arizona. The Coalition's purpose

is to increase public awareness about the issues of domestic and sexual violence, enhance the safety of and services for sexual and domestic violence victims and survivors, and end sexual and domestic violence in Arizona communities.

The **Asian Pacific Institute on Gender-Based Violence** is a California not-for-profit incorporated in 2013 (www.api-gbv.org). The Asian Pacific Institute on Gender-Based Violence ("Asian Pacific Institute" and formerly, "Asian & Pacific Islander Institute on Domestic Violence") is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Asian Pacific Institute analyzes critical issues; promotes culturally relevant intervention and prevention; provides consultation, technical assistance and training; conducts and disseminates research; and informs public policy. The Asian Pacific Institute's vision of gender democracy drives its mission to strengthen advocacy, change systems, and prevent gender violence through community transformation.

The **Avellaka Program** is a La Jolla Band of Luiseno Indians not-for-profit organization incorporated in 2009. The Avellaka Program is dedicated to educating and organizing for social change, upholding the Tribe's authority as a sovereign Indian Nation to protect its women citizens and create the laws, policies, protocols, and advocacy services addressing violence against Native women on the La Jolla Reservation.

Battered Women's Justice Project ("BWJP") is a Minnesota not-for-profit organization incorporated in 2015 (http://www.bwjp.org). The BWIP is a national technical assistance center that provides training and

resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence ("IPV"). The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

Bluff Country Family Resources is a Minnesota not-for-profit organization incorporated in 1984 (http: //www.bluffcountry.org). Bluff Country Family Resources' mission is to provide community education and non-judgmental, confidential crisis intervention, advocacy, support and resources to victims of domestic violence, sexual assault, child abuse and homelessness. Bluff Country Family Resources seeks to create a non-violent world which affirms the rights and dignity of all individuals.

Brave Women Warriors is a Bay Mills not-for-profit organization incorporated in 2009. Brave Women Warriors is a group of women residing within the Bay Mills Indian Community who are concerned about the safety and well-being of women and

children. The Brave Women Warriors' Advisory Committee was established in 2009. The members of the committee include: Diane Teeple, Survivor and Committee Member since 2009; Ruby Hatfield Victim, Advocate and Committee Member since 2009; Anna Rogers-Stott, SA Counselor and Committee Member since 2009; Soloma LeBlanc, Survivor and Committee Member since 2013; and Heather Fegan, Survivor and Committee Member since 2013. We are all women who are concerned about the problems that domestic violence, dating violence, sexual assault, and stalking have caused in our community.

Break the Cycle is a California not-for-profit organization incorporated in 1996 (http://www.breakthecycle.org). Break the Cycle inspires and supports young people to build healthy relationships and create a culture without abuse. It is the leading national non-profit providing comprehensive dating abuse programs exclusively to young people ages 12 to 24. Break the Cycle works everyday to give young people, and those who care about them, the tools they need to live safer, healthier lives.

The **California Coalition Against Sexual Assault** ("CALCASA") is a California not-for-profit organization incorporated in 1984 (www.calcasa.org). CALCASA is the professional association for the 84 rape crisis center programs that serve all counties in California. CALCASA provides leadership, vision and resources to rape crisis centers, individuals and other entities committed to ending sexual violence. CALCASA works closely with rape crisis centers, government agencies, campuses, institutions, policy makers, the criminal justice systems, medical personnel, community-based organizations and business

leaders by supplying knowledge, training and expertise on issues related to sexual violence.

California Partnership to End Domestic Violence is a California organization incorporated in 1993 (http://www.cpedv.org). The California Partnership to End Domestic Violence ("the Partnership") is California's recognized domestic violence coalition, representing over 1,000 advocates, organizations and allied groups. The Partnership promotes the collective voice of a diverse coalition of organizations and individuals, working to eliminate all forms of domestic violence. As an advocate for social change, the Partnership advances the mission by shaping public policy, increasing community awareness, and strengthening members' capacity to work toward the common goal of advancing the safety and healing of victims, survivors and their families.

The **California Women's Law Center** is a California not-for-profit organization incorporated in 1989 (http://cwlc.org). The California Women's Law Center breaks down barriers and advances the potential of women and girls through transformative litigation, policy advocacy and education.

The **California Tribal TANF Partnership** is a California not-for-profit organization incorporated in 2003 (www.cttp.net). The California Tribal TANF Partnership ("CTTP") is associated with 20 Tribes and other organizations that operate tribal Temporary Assistance for Needy Families ("TANF") programs for Native American people. CTTP was established on July 8, 2003, and remains operational under the governing body Robinson Rancheria of Pomo Indians as lead administrators. CTTP's goal and purpose is to help families achieve self-sufficiency through educational training, career and employment opportunities,

as well as various supported services and programs with temporary financial assistance. CTTP continually seeks to add more partners to the consortium and to extend temporary assistance and programs to more Native Americans in need.

Catalyst Domestic Violence Services ("Catalyst") is a California not-for-profit organization incorporated in 1979 (http://www.catalystdvservices.org). Catalyst is administered by a seven-member board of directors. Catalyst's mission is "to reduce the incidence of intimate partner violence through crisis intervention and community education and the promotion of healthy relationships." Catalyst subscribes to a client empowerment model building on the self identified strengths of our clients. Catalyst provides a range of domestic violence intervention and prevention services.

CAWS North Dakota is a North Dakota not-for-profit incorporated in 1978 (www.cawsnorthdakota.org). CAWS North Dakota is the statewide sexual and domestic violence coalition. CAWS North Dakota supports and presents a unified voice for the 20 crisis intervention centers across North Dakota. CAWS North Dakota's mission is to provide leadership and support in the identification, intervention and prevention of sexual and domestic violence.

Clan Star, Inc. is an Eastern Band of Cherokee Indians not-for-profit organization incorporated in 2001 (http://www.clanstar.org). Clan Star is devoted to improving justice to strengthen the safety of Indigenous women through legal, legislative, and policy initiatives, and, education and awareness. Clan Star works to develop public policy strategies addressing violence against Native women.

The **Coalition of Immigrants Refegees and Communities of Color** ("CIRCC") is a Washington not-for-profit organization incorporated in 2001 (www.wearecircc.org). CIRCC builds engaged, involved and equitable communities.

The **Coalition to Stop Violence Against Native Women** ("CSVANW") is a New Mexico not-for-profit organization incorporated in 1996 (www.csvanw.org). CSVANW is a tribal coalition resource center for a diverse member network of rural and urban tribal domestic violence and sexual assault programs, shelters, organizations and agencies that are committed to ending violence against Native women and children in the State of New Mexico in addition to southwest Texas and the Four Corners region. CSVANW's network includes tribal community response partners (tribal leadership, law enforcement, emergency response teams, tribal courts, offender programs, etc.), as well as survivors, tribal youth and key community stakeholders. CSVANW's mission is to stop violence against Native women and children by advocating for social change in tribal communities. CSVANW takes ownership and responsibility for the future of Native women and children by providing support, education and advocacy using our strengths, power and unity to create violence-free communities.

The **Colorado Coalition Against Domestic Violence** ("CCADV") is a Colorado not-for-profit organization incorporated in 1977 (www.ccadv.org). As the federally recognized domestic violence coalition of the State of Colorado, CCADV works with a diverse network of rural and urban Colorado domestic violence victim service programs to encourage appropriate and comprehensive responses to family violence, domestic violence, and dating violence against

adults or youth within Colorado. Now in its 38th year, CCADV provides a strong statewide voice to improve the safety and options for victims of domestic abuse by engaging in strong systems advocacy, public policy development, public awareness and education, and capacity building for Colorado domestic violence programs and allied programs and individuals. CCADV respects the interconnection between all forms of oppression and violence, especially violence against women. Our values support the dignity and worth of all people and we recognize that self-determination is the antidote for power and control inflicted by one person over another.

DNA-People's Legal Services is a not-for-profit legal aid organization, founded in the Navajo Nation in 1967 (www.dnalegalservices.org). "DNA" is an acronym for Diné be'iiná Náhiilna be Agha'diit'ahii, a Navajo phrase that means "attorneys who work for the revitalization of the people." DNA focuses its services on low-income individuals, regardless of race or ethnicity, and its services reach members of seven Tribes – the Hualapai, Havasupai, Kaibab Paiute, Hopi, San Juan Southern Paiute, Jicarilla Apache, and the Navajo Nation. The mission of DNA is to help clients and communities to live in Hozho, or harmony, by addressing the causes and symptoms of poverty, fostering individual independence and dignity, and protecting and promoting tribal sovereignty.

The **Domestic Violence Legal Empowerment and Appeals Project** ("DV LEAP") is a Washington, D.C. not-for-profit organization incorporated in 2003 (http://www.dvleap.org). DV LEAP was founded by one of the nation's leading domestic violence lawyers and law professors to advance safety and justice for

abused women and children through appellate litigation. Despite numerous legislative and policy reforms designed to protect victims of domestic violence, many abused women and children are deprived of legal protections and rights in court. The appellate review process is the only way to correct these trial court errors, but appeals are rare because they are costly and require scarce appellate and domestic violence expertise. DVLEAP responds to this vital need through *pro bono* appellate representation as well as training and strategic assistance to lawyers and courts.

The **Emmonak Women's Shelter** ("EWS") is a not-for-profit organization incorporated in 1983 in the State of Alaska. EWS provides advocacy services to victims of domestic violence, dating violence, and sexual assault. EWS is located in the Native Village of Emmonak. The shelter is the only off-road Alaska Native women's based shelter program in Alaska.

End Domestic Abuse Wisconsin is a Wisconsin not-for-profit organization incorporated in 1979 (www.endabusewi.org). End Domestic Abuse Wisconsin is Wisconsin's coalition of domestic violence victim service providers and the voice for survivors in the state.

Faith Action Network ("FAN") is a Washington not-for-profit organization (www.fanwa.org) formed in 2011 at the union of the Washington Association of Churches ("WAC"), a historical ecumenical agency, and the Lutheran Public Policy Office ("LPPO"), the highly effective advocacy arm of the State's largest Protestant denomination. FAN now builds a more powerful force for change. The merger opened the door for other faith communities to partner in this interfaith movement for the common good. FAN is a

statewide interfaith advocacy 501(c)(3) non-profit organization through which thousands of people and more than 100 faith communities across Washington State partner for the common good. Together, we are a powerful voice of the faithful building a more just, peaceful, and sustainable world.

Family Violence Appellate Project ("FVAP") is a California not-for-profit organization incorporated in 2012 (http://www.fvaplaw.org). FVAP was founded by members of the University of California, Berkeley School of Law community to ensure, through the appellate legal system, the safety and well-being of domestic violence survivors and their children. The goal of FVAP is to aid in creating a body of precedent that will help protect families across California. To that end, FVAP provides direct appellate representation for survivors of domestic violence, in collaboration with *pro bono* attorneys, and offers training to domestic violence attorneys and advocates on issues pertinent to domestic violence appeals. In addition, FVAP monitors litigation and identifies and submits *amicus curiae* briefs in those cases that have the potential to affect the interests of domestic violence survivors and their children statewide. This is one of those cases.

The **First Nations Women's Alliance** is a North Dakota not-for-profit organization incorporated in 2008 (http://www.nativewoman.org/). It is the mission of the First Nations Women's Alliance to strengthen Tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. The Alliance is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating

the provision of those services by others in our communities.

FORCE: Upsetting Rape Culture is a Maryland not-for-profit organization incorporated in 2012 (www.upsettingrapeculture.com). FORCE: Upsetting Rape Culture is a creative activist collaboration to upset the culture of rape and promote a culture of consent. The organization believes that a more difficult and honest conversation needs to happen in America to face the realities of sexual violence, and the organization envisions a world where sex is empowering and pleasurable rather than coercive and violent. To promote this needed conversation, FORCE creates art actions to generate media attention and get millions of people talking.

FreeFrom is a California not-for-profit organization incorporated in 2015 (www.freefrom.org). FreeFrom is a nationwide organization seeking economic justice and opportunity for survivors of domestic violence, child abuse, sexual assault, and sex trafficking. FreeFrom's strategy is threefold: (1) tort litigation on behalf of survivors; (2) public policy reform to strengthen the economic rights and recourses of survivors; and (3) entrepreneurial support to help survivors start their own businesses.

Futures Without Violence ("FUTURES") is a California not-for-profit organization incorporated in 1984 (www.futureswithoutviolence.org). For more than thirty years, FUTURES has been providing groundbreaking programs, policies, and campaigns that empower individuals and organizations working to end violence against women and children around the world. Providing leadership from offices in San Francisco, Washington D.C. and Boston, FUTURES

has established a state-of-the-art Center for Leadership and Action in the Presidio of San Francisco to foster ongoing dialogue about gender-based violence and child abuse.

The **Georgia Coalition Against Domestic Violence** ("GCADV") is a Georgia not-for-profit organization incorporated in 1992 (www.gcadv.org). GCADV's mission is to collaborate, advocate, educate, and empower. GCADV envisions a Georgia free of domestic violence. GCADV empowers survivors and the programs that serve them. GCADV educates the public, and GCADV advocates for responsive public policy. Our strength is in numbers, as GCADV collaborates throughout Georgia to stop domestic violence.

Healing Hearts is a Northern Cheyenne (Montana) not-for-profit organization incorporated in 2000 (www.northerncheyennenation.com). Healing Hearts is a domestic violence program that provides: support and advocacy services to victims of domestic violence and sexual assault; 24/7 on-call crisis services; transportation to shelter/safe homes; referrals to other local programs (recovery; behavioral health, etc.,); and domestic violence/sexual assault education and awareness. We provide services on the Northern Cheyenne Reservation to victims and their families. Healing Hearts serves five Districts including: Busby, Ashland, Birney, Lame Deer and Muddy. Our purpose is to help victims of domestic violence and sexual assault by providing support/advocacy and ensuring their safety and overall well-being through crisis intervention and shelter/safe home housing.

The **Hoopa Valley Tribe Project Connect** is a Hoopa Valley Tribe not-for-profit organization incorporated in 2011 (www.hoopa-nsn.gov/mc-events/

project-connect-domestic-violence-advocacy-course). Project Connect is a domestic violence/sexual assault program, providing education and outreach and direct emergency services. Project Connect offers services to all members of the Hoopa Valley Community.

HopeWorks of Howard County, Inc. is a Maryland not-for-profit incorporated in 1978 (www.wearehopeworks.org). HopeWorks provides support and advocacy to survivors of sexual, dating and domestic violence, and aims to be the catalyst in the community to change the cultural norms that allow sexual and domestic violence to happen. Our mission is to reduce the harm and effects of sexual and domestic violence in Howard County while working towards their elimination. Change must happen. Sexual and domestic violence are not acceptable. We are guided by a vision that sees a community in which everyone is free to live a self-determined life without the threat of these terrible aggressions.

The **Hopi-Tewa Women's Coalition to End Abuse** is an Arizona not-for-profit organization incorporated in 2009. The Coaliation is a tribal domestic violence and sexual assault coalition located on the Hopi Reservation in northeast Arizona. The coalition provides training, technical assistance, policy development, advocacy support and education to the Tribal Government, program partners and community. The Coalition's mission is to advocate for a coordinated and effective response system that creates a safety net towards building healthy communities, while embracing the strength of Hopi cultural values and traditions.

The **Illinois Coalition Against Domestic Violence** ("ICADV") is an Illinois not-for-profit organization incorporated in 1978 (www.ilcadv.org). ICADV

is a membership organization comprised of over 50 local non-profits whose primary mission is to provide services to victims of domestic violence and their dependents. ICADV's mission is to build networks of support for and with survivors, and advance statewide policies and practices that transform societal attitudes and institutions to eliminate and prevent domestic abuse.

The **Indiana Coalition Against Domestic Violence** ("ICADV") is an Indiana not-for-profit oragnization incorporated in 1980 (www.Icadvinc.org). ICADV is committed to ending violence against women through addressing the root causes of violence. Until the violence ends, ICADV will work to improve protective conditions that create a violence-free community.

The **Indian Child Welfare Program of Native Village of Tetlin** is an Alaska not-for-profit organization incorporated in 1932. The purpose of the Program is to provide services to children of which many have witnessed domestic violence in their families and homes.

Indian Health Council, Inc. ("IHC") is a consortium of nine Tribes dedicated to the continual betterment of Indian Health, wholeness, and well-being. With a main facility located adjacent to the Rincon reservation in Pauma Valley and the Santa Ysabel Community Health Center located on the Santa Ysabel Reservation. IHC provides a full spectrum of on-site and outreach services and programs to the North San Diego County reservations of Inaja-Cosmit, La Jolla, Los Coyotes, Mesa Grande, Pala, Pauma, Rincon, San Pasqual, and Santa Ysabel. IHC is concerned for the safety of Native women and

provides services to victims of domestic and sexual assault.

The **Indian Law Resource Center** is a Washington, D.C. and Montana not-for-profit organization incorporated in 1978 (www.indianlaw.org). The Indian Law Resource Center is a non-profit legal and advocacy organization that provides assistance to Indian and Alaska Native Nations and other indigenous peoples throughout the Americas who are working to protect their lands, resources, environment, cultural heritage, and human rights. The Center's principal goal is the preservation and well-being of Indian and other Native Nations and Tribes. The Center's Safe Women, Strong Nations project works to end the epidemic levels of violence against Indian and Alaska Native women and children and its devastating impacts on Native communities by raising awareness of this issue nationally and internationally, by strengthening the capacity of Indian and Alaska Native Nations and Native women to prevent violence and restore safety to Native women, and by assisting national Native women's organizations and Indian and Alaska Native Nations to restore tribal criminal authority and preserve civil jurisdiction.

It's Not Fiction: Domestic Violence, Mental, Physical Abuse & Sex Trafficking-A Survivor's Story ("It's Not Fiction") is a New York not-for-profit organization incorporated in 2015. It's Not Fiction is an organization of individuals working to end domestic violence, mental, physical and sexual violence against men and women by sharing stories of resiliency to break the silence and allow for healing through: (1) providing a voice for victims, their children, families and friends to share and advocate their concerns; (2) acting as an informational resource for

survivors and their allies; and (3) encourage victims of sex slavery to share their stories to help restore and bring justice to vulnerable women, men and children.

Jewish Women International ("JWI") is a Washington, D.C. not-for-profit organization founded in 1897 (www.jwi.org). JWI is the leading Jewish organization empowering women and girls through healthy relationship training, financial literacy education, and the proliferation of women's leadership. JWI's innovative programs, policy advocacy, and philanthropic initiatives protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength.

Kene Me-Wu American Indian DV/SA Program ("Kene Me-Wu Program") is a California not-for-profit organization incorporated in 2000. The Kene Me-Wu Program honors Indian famies for who they are and their needs regarding domestic violence or sexual assault. The Kene Me-Wu Program respects and listens to the needs of the family member coming forward, respecting their rights as a sovereign nation person.

Mending the Sacred Hoop is a Minnesota not-for-profit organization incorporated in 2006 (www.mshoop.org). Mending the Sacred Hoop works from a social change perspective to end violence against Native women and children while restoring the safety, sovereignty, and sacredness of Native women. Mending the Sacred Hoop is committed to strengthening the voice and vision of Native peoples through grassroots organizing, as well as restoring the leadership of Native women in addressing and ending domestic and sexual violence.

The **Michigan Coalition to End Domestic & Sexual Violence** ("MCEDSV") is a Michigan not-for-profit organization incorporated in 1978 (mcedsv.org). MCEDSV is a statewide membership organization whose members represent a network of more than 70 domestic and sexual violence programs and over 200 allied organizations and individuals. We have provided leadership as the statewide voice for survivors of domestic and sexual violence and the programs that serve them since 1978. MCEDSV is dedicated to the empowerment of all the State's survivors of domestic and sexual violence. Our mission is to develop and promote efforts aimed at the elimination of all domestic and sexual violence in Michigan.

The **Minnesota Indian Women's Resource Center** ("MIWRC") is a Minnesota not-for-profit organization incorporated in 1984 (www.miwrc.org). MIWRC works with Native American women and their families to deliver a comprehensive array of services and maintain an extensive referral network to fully meet the needs of the women and families. MIWRC's mission is to empower families to exercise their cultural values and integrity, and to achieve sustainable life ways, while advocating for justice and equity.

The **Minnesota Indian Women's Sexual Assault Coalition** is a Minnesota not-for-profit organization incorporated in 2004 (www.miwsac.org). The Coalition is a statewide tribal coalition and a national tribal technical assistance provider. The Coalition works with 11 Tribes in Minnesota and more then 25 Tribes nationwide. The Coalition works to address sexual violence and sex-trafficking of Native women, and the Coalition's vision is to create safety and justice through the teachings of our grandmothers.

The **Minnesota Indigenous Women's Society** ("MIWS") is a Minnesota not-for-profit incorporated in 2011. MIWS provides direct services to victims of crime in the Upper and Lower Sioux Communities 24 hours a day, 7 days a week. Direct service includes the provision of the following: crisis hotline, information and referral, shelter, other safe housing, food, clothing, personal hygiene items, infant formula, diapers, transportation, and other necessities. MIWS Advocates accompany victims to court, police departments, as well as other social services appointments as requested. Women can receive assistance with filing and making claims for victim compensation.

The **Missouri Coalition Against Domestic and Sexual Violence** ("MCADSV") is a Missouri not-for-profit organization incorporated in 1980 (www.mocadsv.org). MCADSV unites Missourians with a shared value that rape and abuse must end, and advances this through education, alliance, research and public policy. MCADSV provides education and technical assistance, and communication with Missouri's domestic and sexual violence service providers. MCADSV researches the extent of violence against women to more effectively reduce its impact and occurrence in the lives of Missouri's women, children and men. MCADSV works to improve laws, systems, and policies in order to address and prevent violence against women in Missouri.

The **Montana Coalition Against Domestic and Sexual Violence** ("MCADSV") is a Montana not-for-profit organization incorporated in 1986 (www.mcadsv.com). MCADSV is a statewide coalition of individuals and organizations working together to end domestic and sexual violence through advocacy, public education, public policy, and program development.

We advance our mission to: Inspire. Engage. Mobilize! We envision a Montana that honors individual dignity and celebrates diversity, equality, and peace.

The **Montana Native Women's Coalition** ("MNWC") is a Montana not-for-profit organization incorporated in 2007 (www.mtnativewomenscoalition.org). MNWC is the Indigenous Circle of Seven relations with a common goal to honor each Tribe's spirituality and culture. MNWC provides collaborative, cohesive, and respectful efforts to end sexual and domestic violence within the Indian Nations and the State of Montana.

The **Muscogee (Creek) Nation Family Violence Prevention Program** ("FVPP") is a Muscogee (Creek) Nation not-for-profit organization founded in 1996 (www.muscogeenation-nsn.gov/Pages/FamViolence/famviol.html). FVPP operates within the government of the Muscogee (Creek) Nation, a federally recognized Indian Tribe. The Mission of the Family Violence Prevention Program is to provide advocacy and supportive services to victims/survivors of domestic violence, sexual assault, dating violence and stalking in an effort to achieve safety, justice, and healing for individuals, families and our great Muscogee (Creek) Nation.

Naa Vúra Yeéship is a behavioral health treatment program for children within the **Karuk Community Development Corporation**, a Karuk Tribe of California chartered not-for-profit organization incorporated in 1982 (http://www.karuk.us/index.php/departments/ community-development). The mission of the Karuk Community Development Corporation is to develop among tribal members of the Karuk Tribe of California the managerial and technical capabilities to assume leadership roles in

building diversified and sustainable economies. Naa Vúra Yeéship furthers and supports this goal by cultivating and nurturing our most precious resource; the children of the Karuk Tribe. Supported by California's American Indian Child Abuse Treatment ("AICHAT") funding, the Naa Vúra Yeéship staff provides therapeutic and intervention services to both Native and non-Native children who live in the organization's catchment area of Yreka, Happy Camp, and Orleans, the three major population centers of the Karuk. Cultural activities incorporating Karuk ceremony, traditional healing and food sustainability projects combine with evidence based talking treatments allow clients to heal in an environment that is culturally appropriate. Naa Vúra Yeéship empowers its clients to not only "survive" but "thrive."

The **National Alliance to End Sexual Violence** ("NAESV") is a Washington D.C. not-for-profit organization incoporated in 2011 (www.endsexual violence.org). The NAESV is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The local rape crisis centers in our network see every day the widespread and devastating impacts of sexual assault upon survivors and provide the frontline response in their communities advocating for victims, spreading awareness and prevention messages, and coordinating with criminal justice and other professionals who respond to these crimes.

The **National Coalition Against Domestic Violence** ("NCADV") is a Colorado not-for-profit organization incorporated in 1978 (www.ncadv.org). The vision of NCADV is to create a culture where domestic violence is not tolerated; and where society

empowers victims and survivors, and holds abusers accountable. NCADV's mission is to be the voice of victims and survivors. NCADV is the catalyst for changing society to have zero tolerance for domestic violence. NCADV does this by effecting public policy, increasing understanding of the impact of domestic violence, and providing programs and education that drive that change.

The **National Domestic Violence Hotline** is a Texas not-for-profit organization incorporated in 1996 (www.thehotline.org). Every day, 24/7/365, the National Domestic Violence Hotline provides confidential, compassionate, and practical help to the more than 400,000 people who contact the Hotline for help with domestic and dating violence issues every year via phone, chat and text. With a database of more than 5,000 providers and resources in the United States, Puerto Rico, the U.S. Virgin Islands, and Guam, the Hotline and its youth component (www.Loveisrespect.org), provide confidential conversations and crucial information to help guide survivors to appropriate programs and safety. Since 1996, more than 3.7 million people have received help from The Hotline.

The **National Network to End Domestic Violence** ("NNEDV") is a Washington, D.C. not-for-profit organization incorporated in 1995 (www.nnedv.org). NNEDV is the leading voice for domestic violence victims and their advocates. As a membership and advocacy organization of state domestic violence coalitions, allied organizations and supportive individuals, NNEDV works closely with its members to understand the ongoing and emerging needs of domestic violence victims and advocacy programs.

NNEDV ensures those needs are heard and understood by policymakers at the national level, and offers a range of programs and initiatives to address the complex causes and far-reaching consequences of domestic violence.

The **National Resource Center on Domestic Violence** is a Pennsylvania not-for-profit organization incorporated in 1993 (www.nrcdv.org). The mission of the National Resource Center on Domestic Violence ("NRCDV") is to strengthen and transform efforts to end domestic violence. Since 1993, the NRCDV has provided comprehensive and individualized technical assistance, training and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multi-disciplinary approaches, and a commitment to ensuring that policy, practice, and research is grounded in and guided by the voices and experiences of domestic violence survivors and advocates.

The **Native Alliance Against Violence** is an Oklahoma not-for-profit organization incorporated in 2009 (www.oklahomanaav.org). The Native Alliance Against Violence is Oklahoma's only tribal domestic and sexual violence coalition. Through the Spirit of respect and cooperation, the Native Alliance Against Violence strives to unify tribal service programs throughout Oklahoma by providing culturally appropriate technical assistance, training and support to eliminate domestic violence, sexual violence, dating violence, stalking and sex trafficking to restore balance and safety for Native communities.

The **Native Women's Coalition** is an Idaho not-for-profit organization incorporated in 2009. The Coalition provides awareness through education, training and technical assistance to Native and non-Native service providers to stop domestic violence and sexual assault against Native women and children, both on reservation and in rural and urban off reservation communities. The Coalition believes it is essential that all providers understand the unique need for the delivery of culturally appropriate services to victims, especially child victims.

The **Native Women's Society of the Great Plains** is a South Dakota not-for-profit organization incorporated in 2008 (www.nativewomenssociety.org). The Coalition's mission is to promote the safety of Native women. The Coalition is comprised of organizations that provide shelter and services to Native women experiencing violence in their homelands.

The **New Jersey Coalition to End Domestic Violence** ("NJCEDV") is a New Jersey not-for-profit organization incorporated in 1979 (www.njcedv.org). NJCEDV is a statewide coalition of 30 domestic violence programs and concerned individuals whose purpose and mission is to end domestic violence. With the support and perseverance of our member programs, the Coalition stands united in its efforts to provide safety and support to victims and survivors of domestic violence, to hold offenders accountable, to engage community-based systems to enhance their response to all forms of domestic and sexual violence, and to develop and implement programs that promote the prevention of domestic and sexual violence. NJCEDV recognizes that domestic and sexual violence

knows no boundaries regardless of race, class, education level, socio economic status, gender, sexual orientation, age, nation of origin, etc. Through NJCEDV's Inclusion and Access Initiative, NJCEDV strives to work with member organizations and community partners to ensure that programs and services are inclusive and accessible to individuals from all backgrounds and communities.

The **New Mexico Center on Law and Poverty** is a New Mexico not-for-profit organization incorporated in 1996 (www.nmpovertylaw.org). The New Mexico Center on Law and Poverty is dedicated to advancing economic and social justice through education, advocacy and litigation. We work with low-income New Mexicans to improve living conditions, increase opportunities, and protect the rights of people living in poverty. We work to assure that the policies, laws, and practices intended to address the problems of those living in poverty are well-designed and are implemented legally, fairly, and effectively.

The **North Carolina Coalition Against Domestic Violence** ("NCCADV") is a North Carolina not-for-profit organization incorporated in 1981 (www.nccadv.org). NCCADV is a statewide organization that works to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. NCCADV works to support all North Carolinians in building peaceful communities and families.

The **Oglala Sioux Tribe Victim Service Program** ("OST Victim Service Program") is an Oglala Sioux Tribe not-for-profit organization incorporated in 1924. The OST Victim Service Program is a family violence prevention program that serves to support victims of domestic and sexual assault. Within the

service community of the OST Victim Service Program these forms of violence are predominantly perpetrated against women, children, young girls, and young men. Any victim of such abuse shall not be denied service due to economic status, tribal affiliation, nor will anyone be denied service on the basis of race, ethnicity, age, gender, or sexual orientation.

The **Osage Nation Domestic Violence Program** is an Osage not-for-profit organization that first opened in 1995. The Osage Nation Domestic Violence Program has the only Native American shelter in northern Oklahoma where we serve everyone.

P&S Legal Advocacy, PLLC is an Oklahoma limited liability company incorporated in 2010 (www.pslegalok.com/index.php/partners). P&S Legal Advocacy, PLLC ("PSLA"), was formed by Sheree L. Hukill and Penny L. Pricer in 2010 to provide direct legal services to our clients. Ms. Hukill and Ms. Pricer also formed Integrated Concepts, Inc. ("ICI"), a Women's Business Enterprise National Council Certified consulting firm in 2008 to encourage collaboration among non-profits, government entities, educational institutions, and businesses to build stronger, safer communities. All members of the ICI/PSLA teams strive to continually build and maintain professional knowledge and relationships with national, tribal, state, and local service providers and legal professionals within the DV/DV, SA, and Stalking field. The P&S Legal Advocacy founding partners have attended and/or presented at over 125 hours of training in these areas within the last three years. Each team member is well versed in the dynamics of change and learning/thinking theories necessary to meet the ever-changing needs of our individual and non-profit clients.

Rape Advocacy, Counseling and Education Services is an Illinois not-for-profit organization incorproated in 2009 (www.cu-races.org). The mission of Rape Advocacy, Counseling and Education services is to deconstruct rape myths and empower victims and survivors of sexual violence through advocacy, counseling, education, crisis intervention, and activism. The organization also works with non-offending significant others, allied professionals, and the community at large to end all forms of sexual violence. The orgnization believes that working to end sexual violence, a widespread form of oppression that primarily victimizes women and children, is essential to building a world free from all forms of oppression.

Restoring Ancestral Winds, Inc. ("RAW") is a Utah not-for-profit organization incorporated in 2013 (www.restoringancestralwinds.org). The mission of RAW is to support healing in our indigenous communities. RAW will advocate for healthy relationships; educate our communities on issues surrounding stalking, domestic, sexual, dating and family violence; collaborate with Great Basin Region community members and stakeholders; and honor and strengthen traditional values with all our relations.

Sacred Spirits First Nations Coalition ("Sacred Spirits") is a Minnesota not-for-profit corporation incorporated in 2001. Sacred Spirits is a non-profit that has been addressing domestic violence and sexual assault of Native American and Alaska Native Women for 14 years. Sacred Spirits' mission is to reclaim the sacred spirits of women, men, and their families for the next seven generations by healing the effects of historical trauma through culturally competent practices utilizing traditional Anishinaabe values and beliefs. Sacred Spirits is dedicated to unifying the

safety response on behalf of Native women, men and their families being victimized by sexual and domestic violence. Sacred Spirits, in its mission, vision, and strategic plan, keeps a priority to reduce or eliminate domestic violence, dating violence, sexual assault in the White Earth area or surrounding area.

Salem Lutheran Church is a Maryland not-for-profit organization incorporated in 1885 (www.salem southbaltimore.org). Salem Lutheran Church has served in the Riverside section of Baltimore, Maryland for 130 years. The Church is a justice-minded congregation whose membership is committed to sharing faith, hope and God's love to all whom they encounter. The leadership of the Church has been actively engaged in efforts, both locally and nationally, to eradicate rape and domestic abuse from American culture and society.

The **SD Coalition Ending Domestic & Sexual Violence** ("SDCEDSV") is a South Dakota not-for-profit organization incorporated in 1978 (www. sdcedsv.org). The SDCEDSV is dedicated to social change to ending violence against women and their children. Our organization provides technical assistance, training, material development, etc., to support community-based organizations that offer advocacy, shelter, and prevention education to victims of domestic and sexual violence.

The **Seminole Nation Domestic Violence Program** is a Oklahoma not-for-profit organization incorporated in 2005. The Seminole Nation Domestic Violence Program serves Native American and non-Native families by providing advocacy in the areas of domestic violence, sexual assault, stalking and/or dating violence. The Seminole Nation Domestic Violence Program's mission is to empower both Native

and non-Native families in breaking the cycle of violence by helping them understand the different types of abuse, finding safe housing and obtaining healthy relationships that do not involve manipulation or control of another person.

The **Seven Dancers Coalition** is a New York not-for-profit organization incorporated in 2009 (www.sevendancerscoalition.com). The Coalition is located in upstate New York, and thus the Coalition's territory straddles the United States and Canadian boarder. The Coalition is established to bring awareness and prevention on SA, DA, Campus Safety, Teen Dating, Stalking and Sex Trafficking. The Coalition's mission is to uplift families of indigenous communities by educating and restoring traditional values with the purpose of strengthening self-confidence and dignity. We strive for an environment of peace and tranquility in order to heal the damaged spirit.

The **Sexual Assault Response Team Program of the Pauma Band of Mission Indians** is a Pauma Band of Mission Indians not-for-profit organization incorporated in 2010. The Sexual Assault Response Team of the Pauma Band of Mission Indians was established to respond to crimes of sexual assault committed on the Pauma Indian reservation. The program is designed to provide tribal based services to Luiseno women on tribal lands and also advocate for tribal sexual assault victims within the California state county system.

The **Soboba Women's Group** is a not-for-profit organization incorporated in 2008 in the State of California. The Soboba Women's Group provides community education, crisis response and advocacy services to Native women and children who are victimized by physical and sexual violence.

The **Southern California Tribal Chairmen's Association** ("SCTCA") is a multi-service non-profit corporation established in 1972 for a consortium of 19 federally-recognized Indian tribes in Southern California. The primary mission of SCTCA is to serve the health, welfare, safety, education, cultural, economic and employment needs of its tribal members and descendants in the San Diego County urban areas. A board of directors comprised of tribal chairpersons from each of its member Tribes governs SCTCA.

The **Southwest Indigenous Women's Coalition** ("SWIWC") is an Arizona not-for-profit organization incorporated in 2006 (www.swiwc.org). SWIWC is located in Mesa, Arizona, and works to end domestic and sexual violence against Native women. Through training, technical assistance, policy development, and outreach education, SWIWC helps to build the capacity of Tribes in Arizona to better address and respond to the violence occurring in their communities.

The **Strong Hearted Native Women's Coalition, Inc.** is a California not-for-profit organization incorporated in 2006 (www.strongheartedwomen.org). Strong Hearted Native Women's Coalition was founded in 2005 to bring awareness against Sexual Assault, Domestic Violence, Youth Violence, and Stalking in North County of the San Diego County. Native women from the Indian reservations of Rincon, Pauma, Mesa Grande, Santa Ysabel, La Jolla, San Pasqual, Los Coyotes, Pala, and Inaja/Cosmit make-up our coalition membership. Over the years, our coalition has expanded to include Tribes from all of Southern California as well as other Tribes throughout the state of California. The purpose of the Coalition is to enhance the capacity of survivors,

advocates, Indian women's organizations, and victim services providers to form non-profit, nongovernmental tribal domestic violence and sexual assault coalitions to advance the goal of ending violence against American Indian and Alaskan Native women. The overarching goal of the Strong Hearted Native Women's Coalition program is to increase the amount of dedication to improving systemic and community responses to victims. To raise awareness, educate, and to provide technical assistance, training, and supportive services for victims of sexual assault, domestic violence, dating violence, stalking, and human/sex trafficking including cultural and unique barriers facing Native American Women. The Strong Hearted Native Women's Coalition by honoring our women ancestors, advocates for women and their families by promoting safety and a traditional non-violent lifestyle. The Coalition works towards empowering women with the tools for independence, courage, and a strong direction to make healthy life choices for herself, her children, and family.

Survivor Outreach Services is a Little Traverse Bay Bands of Odawa Indians not-for-profit organization incorporated in 2012 (www.ltbbodawa-nsn.gov). Little Traverse Bay Bands of Odawa Indians Survivor Outreach Services is designed to assist Native American and non-Native intimate partners who have/are experiencing domestic violence, sexual assault, stalking, and dating violence.

The **Three Sisters Program** ("Three Sisters") is a St. Regis Mohawk Tribe not-for-profit organization incorporated in 2005. Three Sisters is a state and federally funded domestic violence and sexual assault program servicing three countries advocating for victims and families in crisis and during challenging

times in their lives. With the help of other St Regis Mohawk, Canadian, and local coalitions and programs, Three Sisters is able to provide wrap-around services that will not only help the victim and family in crisis, but will also work to heal and empower them to be their own advocates.

The **Ti Hirasa Domestic Violence and Sexual Assault Healing Center** is a Pawnee Nation not-for-profit organization incorporated in 2009 (www.pawneenation.org/page/home/divisions/division-of-health-community-services/ti-hirasa-domestic-violence-program). Ti Hirasa is a confidential support service to victims of domestic violence, dating violence, sexual assault, and stalking. The Center serves all of Pawnee County regardless of age, economic status, race, religion, or education background. The Center prioritizes Native American women and members of the Pawnee Nation. The Center's mission is to provide prevention and awareness and increase victim safety and offender accountability.

The **Tribal Law and Policy Institute** is a California not-for-profit organization incorporated in 1996 (www.tlpi.org). The Tribal Law and Policy Institute is a Native American owned and operated non-profit, organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian Country and the health, well-being, and culture of Native peoples.

The **Tulalip Office of Civil Legal Aid and the Legacy of Healing** is a Washington not-for-profit organization incroporated in 1936 (www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/Attorneys/TulalipOfficeofCivilLegalAid.aspx). The Tulalip Office of Civil Legal Aid and the Legacy of

Healing's role is to provide culturally sensitive, competent legal representation in a holistic manner for referred adult victims of domestic violence, sexual assault, dating violence, and stalking at no cost to the victim. This legal representation includes a wrap-around service of civil legal matters, in tribal and state court, that affect victims of domestic violence, such as custody, safe visitation, divorce, child support, and protection orders.

Uniting Three Fires Against Violence is a Michigan not-for-profit organization incorporated in 2009 (www.unitingthreefiresagainstviolence.org). Uniting Three Fires Against Violence ("UTFAV") is a statewide tribal coalition against domestic and sexual violence. UTFAV's mission is "[t]o support Michigan Tribes in promoting the social change necessary to address the disproportionate rates of violence impacting our communities." UTFAV envisions: (1) empowered Native American survivors with access to essential and culturally appropriate services throughout the State of Michigan; (2) tribal communities that have access to the resources necessary to provide the identified services: and (3) tribal, State and Federal responses that are guided by culturally appropriate and trauma informed practices.

The **Utah Coalition Against Sexual Assault** is a Utah not-for-profit organization incorporated in 1997 (www.ucasa.org). The Utah Coalition Against Sexual Assault ("UCASA") was originally formed by a small group of rape crisis program directors to address identified gaps in the response to sexual violence survivors in Utah. Today, UCASA continues to engage individuals and organizations in local and statewide collaborations to strengthen the effectiveness of sexual violence education, prevention and response in Utah.

In collaboration with state and local partners UCASA coordinates delivery of a 40-Hour Rape Crisis Advocacy Curriculum; provides training and technical assistance for Rape Prevention Educators in several Utah communities; provides training and support on the coordination of Sexual Assault Response Teams; and increases statewide capacity to train and support Sexual Assault Nurse Examiners. UCASA recognizes that to ensure accessibility of services and protections for the most vulnerable communities, society must increase the representation of marginalized and underserved populations in the planning, coordination, and provision of sexual assault prevention and response, and thus UCASA is actively pursuing this goal through local and national partnerships with culturally specific organizations and those committed to achieving social justice for all.

The **Vermont Network Against Domestic and Sexual Violence** is a Vermont not-for-profit organization incoporated in 1986 (www.vtnetwork.org). The Vermont Network Against Domestic and Sexual Violence ("Vermont Network") is a feminist organization dedicated to eliminating domestic and sexual violence through advocacy, empowerment, and social change. The Vermont Network is a coalition of 14 domestic and sexual violence programs throughout Vermont with a statewide office located in Montpelier. The Vermont Network envisions a world free of oppression where actions, beliefs and systems support all people to thrive. The Vermont Network's purpose is to work with others to create that world. To do this, the Vermont Network works to create conditions which are favorable for member program success. Member Program Success means survivors are supported and empowered in getting their needs met and

communities are working toward eliminating domestic violence and sexual assault.

The **Violence Intervention Program, Inc.** is a New York not-for-profit organization incorporated in 1975 (www.vipmujeres.org/#). The Program's mission is to lead Latina victims of domestic abuse to safety, to empower them to live violence-free lives, and to reach and sustain their full potential. The Program pursues this mission by raising community awareness, engaging in activism, and by providing culturally competent services.

The **Wabanaki Women's Coalition** ("WWC") is a Maine not-for-profit organization incorporated in 2013 (www.wabanakiwomenscoalition.org). The mission of the WWC is to increase the capacity of tribal communities to respond to domestic and sexual violence and influence tribal, national, and regional systems to increase awareness, safety, justice, and healing for all our relations. The WWC's vision is to guide the evolution of systems and policies that reflect the WWC's Wabanaki voice on behalf of survivors of domestic and sexual violence. The vision is also to create a technical resource center that affirms Wabanaki cultural values and tribal sovereignty, and empowers tribal service providers to serve, educate and influence their communities in an effective and uniform way. The WWC also seeks to be recognized as the informed resource for issues on Wabanaki survivors of domestic and sexual violence.

The **Washington State Coalition Against Domestic Violence** is a Washington not-for-profit organization incorporated in 1990 (www.wscadv.org). The Washington State Coalition Against Domestic Violence ("WSCADV") is the leading voice for ending domestic violence in Washington State. WSCADV

mobilizes member programs and allies to end domestic violence through advocacy and action for social change. WSCADV recognizes the sovereignty of Tribes and the critical role tribal courts and Tribal Governments have in ending domestic and sexual violence against Native women.

The **Washington State Native American Coalition Against Domestic Violence & Sexual Assault** is a Washington not-for-profit organization incorporated in 2005 (www.womenspirit.net). The Coalition envisions a Nation where Native women live safely and where all citizens embrace these core values as they strive towards a collective vision of safety. The Coalition believes in the empowerment of survivors, restoration of spiritual and traditional practices, human rights advocacy, restorative justice, and promoting healing from trauma.

We' We' Netth e ge' is a Hannahville Indian Community not-for-profit organization incorporated in 1990 (www.Hannahville.net). Our organization is a Victim Advocacy Program within the structure of the Hannahville Indian Community Tribal Court system. Our mission is to serve victims of crime on the reservation and those tribal and descendent members living off reservation in the surrounding counties. We have been in operation since 1990 and will continue to offer services that enhance the healing of victims and promote non-violence within Indian Country.

The **White Buffalo Calf Woman Society Incorporated** ("WBCWS") is a Rosebud Sioux Tribe not-for-profit organization incorporated in 1978 (www.wbcws.org). WBCWS was the first Native American Women's Shelter in the United States. WBCWS is committed to providing shelter, safety, and advocacy for individuals victimized by violence. It is also the

mission of the WBCWS to support everyone in the exploration of ourselves and our attachment to beliefs that justify our own oppression and the oppression of others. As all work to transform the world into a circle of peace and harmony, individual responsibility and self-growth is essential. We are committed to providing shelter, safety, and advocacy for individuals victimized by violence. We recognize the necessity of a multi-faceted approach – the need to develop an effective response to systems in our community such as health, criminal justice, and other institutions that minimize violence against women. It is our hope that our federal courts will support inherent tribal power by supporting the Tribes' inherent right to protect its citizens when a non-Indian conduct has harmful consequences on its tribal citizens.

Wica Agli is a South Dakota not-for-profit organization incorporated in 2013 (www.wicaagli.org). Wica Agli is working to create more male allies for women. We work with men and boys to create a nonviolent environment. We do this by reintroducing traditional cultural life ways.

Wiconi Wawokiya, Inc., ("Wiconi Wawokiya") is a South Dakota not-for-profit organization incorporated in 1987 (www.wiconiwawokiya.org). Wiconi Wawokiya's (Helping Families) mission is to reduce violence in the homes, workplace, schools, and the communities in which we live. Wiconi Wawokiya strives to provide safety to the victims of domestic violence, dating violence, stalking, adult and child sexual assault victims. Wiconi Wawokiya empowers those who are oppressed by providing information, encouragement and support. Wiconi Wawokiya works to promote respect for individual differences and diversities. Wiconi Wawokiya educates society on the dynamics of

domestic violence and sexual assault in intimate relationships, stalking, rape, human trafficking, and child sexual assault.

Wild Horse Butte CDC is a South Dakota not-for-profit organization incorporated in 2011 (www.wildhorsebutte.org). Wild Horse Butte CDC works on the Pine Ridge Indian Reservation on social issues. The organization's mission is to create a better quality of life for tribal members, including a life free of domestic violence and sexual assault. Wild Horse Butte CDC operates a domestic violence shelter known as the Sacred Shawl Society Domestic Violence Shelter on the Pine Ridge Indian Reservation.

The **Wisconsin Coalition Against Sexual Assault** ("WCASA") is a non-profit organization incorporated in the State of Wisconsin in 1985 (www.wcasa.org). WCASA is a statewide member organization composed of sexual assault programs, sexual assault survivors and individuals and agencies promoting the social change necessary to end sexual violence. WCASA currently has over 140 members. WCASA provides training and technical assistance to 51 sexual assault victim advocacy organizations throughout the State of Wisconsin and other agencies that work directly with victims of sexual assault.

Women of Color Network, Inc. is a Pennsylvania not-for-profit organization incorporated in 2009 (www.wocninc.org). The Women of Color Network, Inc. is a national grassroots organization amplifying the leadership and voices of women of color and tribal women seeking to end oppression and violence across all communities.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault** ("WCADVSA") is a Wyoming not-for-profit organization incorporated in 1987 (www.wyomingdvsa.org). WCADVSA is a statewide domestic violence/sexual assault ("DVSA") coalition with 23 local DVSA program members that constitute the core membership. WCADVSA advocates for programs and the victims they serve. WCADVSA also provides assistance and support to the Wind River Indian Reservation.

The **Yupik Women's Coalition** ("YWC") is an Alaska not-for-profit organization incorporated in 2007 (www.yupikwomen.org). The YWC strives to promote safety of women through education and advocacy. The YWC is committed to organize community efforts to end violence against women and children with Yup'ik villages through strengthening the traditional Yup'ik beliefs and teachings that have guided the Yup'ik people for thousands of years. The YWC is dedicated to the safety of women and believes in all the rights of all people to live without fear, threat, violence and oppression.

* * *

AMICUS CURIAE BRIEF

No. 13-1496

In The Supreme Court of the United States

DOLLAR GENERAL CORPORATION, et al.,

Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF OKLAHOMA, WYOMING, UTAH, MICHIGAN, ARIZONA, AND ALABAMA IN SUPPORT OF PETITIONERS

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STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICI TO FILE[1]

The States of Oklahoma, Wyoming, Utah, Michigan, Arizona, and Alabama as amici curiae have an interest in the outcome of this case because they are home to dozens of federally recognized Indian tribes that engage in commercial enterprises doing business with non-tribal members on Indian land. The States thus submit this brief to offer their unique perspective as states with robust, and in some instances multi-billion dollar, tribal economies. If the decision below is affirmed, the States will become a patchwork of jurisdictions adjudicating tort claims in a disparate manner.

STATEMENT

Today's Indian tribes engage in a remarkably diverse array of commercial activities: tribal enterprises include casinos, convenience stores, hotels, restaurants, grocery stores, and more. These businesses are open to the non-tribal member public, and in most instances are specifically geared to attracting non-tribal member customers. In some states, these businesses are located within the confines of a

[1] Pursuant to Rule 37.6, the State of Oklahoma affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the State of Oklahoma or its counsel made such a monetary contribution.

reservation. In others – like Oklahoma, which has 38 federally-recognized Indian tribes but no reservations – the businesses are located on small, scattered parcels of tribal trust land, often immediately adjacent to and interspersed with non-tribal businesses.

For example, a motorist southbound on United States Highway 69/75 in Atoka, Oklahoma, will have several options for food and fuel. One of those options is the Choctaw Travel Center. Across the highway and slightly further south is another option, the Love's Travel Stop. Both offer food and fuel, but with one indiscernible difference. The Choctaw Travel Center is a business enterprise of the Choctaw Nation of Oklahoma situated on a tiny, isolated parcel of Indian land.[2] The Love's Travel Stop, on the other hand, is a privately owned business on land fully subject to the sovereign jurisdiction of the State of Oklahoma.

The decision to pull into the Choctaw Travel Center rather than the Love's Travel Stop should not have major legal ramifications. But according to the Fifth Circuit, the decision might well amount to engaging in a consensual commercial relationship with the tribe, thus rendering the traveler subject to being haled into tribal court to answer a tort claim.

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[2] Atoka County consists of 624,332 acres. Only about 133 of those acres (scattered across approximately 44 small parcels) are Indian land. This is typical of the nature of Indian lands in Oklahoma.

Once sued, the nonmember will face a number of difficulties in ascertaining how to defend the claim. For instance, about half of Oklahoma's tribes have a court system, and less than that have a full, written legal code. But as might be expected, tribal tort law is a product of common law, made up of traditions passed down by tribal elders.[3] So even if the tribal court issued published opinions that might offer guidance as to what that common law is (few, if any, do), one cannot simply do a Westlaw search for those opinions. In short, the nonmember, even after they have hired an attorney, will be walking into a tribal court with none of the jurisprudential certainty that they would have in state or federal court, unaware of the elements of the claims they are defending against, and unaware of what defenses might be available to them.

These situations do not only arise in Oklahoma. For example, the State of Wyoming contains one Indian reservation with two tribes – the Northern Arapaho Tribe and the Eastern Shoshone Tribe each reside in the Wind River Reservation in west-central Wyoming. While the tribes traditionally cooperated to provide services on the reservation, in the last few years the tribes have begun to exercise their

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[3] Qualifiers like "some" and "about" are used here with a purpose. Even for State's attorneys experienced in Indian law, it is all but impossible to ascertain the precise contours of each tribe's legal systems. Some tribes have websites providing information about their court systems and links to their legal codes, while others do not.

government powers independently of one another with separate tribal codes and, in the future, perhaps even separate court systems.[4] Nonmembers who interact with tribal members or tribal enterprises on Indian lands – for example, nonmembers leaving Riverton on the edge of the reservation on the way to other parts of Wyoming – would not know *which* set of laws would bind them even if they know they are dealing with a tribal enterprise or are located on some kind of tribal land in an Indian reservation.

And to the extent there are concerns about local biases, those concerns can be alleviated for state court litigation through either (1) diversity jurisdiction, which allows a non-citizen litigant to remove the case to the neutral tribunal of a federal court, or (2) alternative venues and geographically removed appellate courts, which are available when both litigants are citizens. A nonmember haled into a local tribal court is afforded neither of these safeguards. The nonmember cannot remove the case to a neutral forum, cannot request transfer to an alternative forum (most tribal courts offer only a single venue), and cannot appeal to a separate and removed appellate court system – to the extent that a tribe has an appellate court system (many do not), those appellate

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[4] Gregory Nickerson, *Northern Arapaho dissolve joint council in bid for sovereignty*, WyoFile (Sept. 10, 2014), www.wyofile.com/specialreport/northern-arapaho-dissolve-joint-business-council-in-bid-for-sovereignty; Northern Arapaho Code tit. 17, §§ 302, 303, 401 (authorizing creation of new courts, recognizing joint court with Eastern Shoshone, and creating separate magistrate court).

courts are typically housed in the same location as the trial court, often sharing a single courtroom.[5]

The Fifth Circuit – and the United States – find nothing particularly troubling about all this. During certiorari briefing, the United States accepted that the decision below will allow "'pervasive tort liability against countless business[es] and individuals'" in consensual relationships with tribes or tribal members. U.S. Br. 13 (quoting Pet. 20). The purpose of this brief is to explain why this Court should in fact be deeply troubled by the implications of the decision below, and should thus narrowly construe the reach of the first *Montana* exception.

SUMMARY OF THE ARGUMENT

I. As a general matter, "regulation" through tort lawsuits brought by private parties should not be considered a valid "other means" of regulation by tribes. While tort law may be a valid means of regulation in jurisdictions with established and accessible bodies of common law, tort law is far too opaque to provide the fair notice and clarity needed to operate as a valid regulatory scheme in tribal jurisdictions. And because of that lack of clarity, it is all

[5] See, *e.g.*, *Cherokee Nation Judicial Branch*, www.cherokeecourts.org (noting location of entire Cherokee court system in one Cherokee Nation Judicial Building).

but impossible for a nonmember to ever knowingly consent to tribal tort law.

II. Nor can an Indian tribe's authority to exclude nonmembers from tribal lands provide an independent basis for the exercise of tort jurisdiction over nonmembers. A tribe's authority to "exclude outsiders from entering tribal land" has never been understood to equate to a general "authority over non-Indians who come within their borders," and this case provides no compelling justification for abandoning that longstanding rule.

III. Even if exercise of tort jurisdiction were a valid means of "other regulation," the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." Thus, the burden should be placed on the tribe or tribal member to establish as a threshold matter that the tribal court's exercise of tort jurisdiction is necessary to further those core sovereign interests. Given that tort claims against nonmembers have historically been adjudicated in state and federal courts, it is unlikely that a tribe could successfully argue that exercise of such jurisdiction is newly necessary to its preservation of self-government and control of its internal relations.

IV. Even when a tribe has established that exercise of tort jurisdiction is necessary to safeguard core sovereign interests, the *Montana* exception allowing the exercise of such jurisdiction should be

narrowly construed to avoid the possibility that nonmembers who do nothing more than frequent tribal businesses will be subjected to tribal court jurisdiction. A nonmember should only be haled into tribal court to answer a tort claim where (1) the nonmember has engaged in commercial dealings with the tribe and has expressly and unambiguously consented to tribal court jurisdiction for tort claims (such as in a forum selection clause of a contract), and (2) the tort claim has a close nexus to the commercial dealing.

V. State and federal courts have always provided an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not. The decision below upends that longstanding framework, and will result in significant legal uncertainty in states with Indian tribes. Additionally, the decision undermines Congress's policy – embodied in 28 U.S.C. § 1441 – of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sovereign to which both parties belong.

ARGUMENT

I. "Regulation" through tort lawsuits brought by private parties is not a valid "other means" of tribal regulation.

In *Montana*, this Court held that "[a] tribe may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 565 (1981) (emphasis added).

As a general matter, "regulation" through tort lawsuits brought by private parties should not be considered an "other means" of regulation by tribes. The "other means" exception – an exception built entirely on the idea of nonmember consent – "envisages discrete regulations consented to *ex ante*." *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 182 (5th Cir. 2014) (Smith, J., dissenting). Tribal tort law is far too opaque to provide the fair notice and clarity necessary for that consent. Indeed, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends * * * is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' which differ from traditional American courts in a number of significant respects." *Nevada* v. *Hicks*, 533 U.S. 353, 383-84 (2001) (Souter, J., concurring) (citations omitted). Tribal courts in fact exhibit a diverse array of characteristics as to "their structure, in the substantive law they apply,

and in the independence of their judges." *Id.* at 384 (Souter, J., concurring).

To the extent written tribal codes could be located for Oklahoma's tribes, many of those codes contemplate tribal customary law as providing key rules for decision. The statutes of the Seminole Nation of Oklahoma, for instance, direct that the Nation's "Constitution, Statutes, and Common Law" shall be applied in civil actions. Seminole Nation of Oklahoma Code tit. 3, § 11(a)(1). However, "[t]he customs and traditions of the Nation" are what constitute the "Common Law." *Id.* § 6. And to enable the tribal court to ascertain those customs and traditions, the court is given the power to "subpoena and request the advice of elders and councilors familiar with [tribal] customs and usages." *Id.* § 11(c). In other words, in some instances there will quite literally be no way for a nonmember litigant to know in advance what Seminole tort law encompasses.

This is a common construct in tribal law,[6] and it illustrates what Justice Souter recognized in his concurrence in *Hicks* – tribal court systems vary wildly from tribe to tribe, and that tribal law can be

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[6] See, *e.g.*, Sac & Fox Nation Code tit. 6, §§ 4, 11; Osage Nation Code tit. 3, § 1-101; Muscogee Nation Code Ann. tit. 27, §§ 1-103(A), 1-104; Kickapoo Tribe of Oklahoma Rules of Civil Procedure §§ 4, 11(a), (c); Iowa Tribe of Oklahoma Code tit. 2, §§ 4, 11(a), (c); Choctaw Nation of Oklahoma Code of Civil Procedure § 2; Chickasaw Nation Code tit. 5, § 5-102.7.

"unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

First, each Native American tribe has its own customs and traditions, meaning that a different point of substantive law may be applied based on the customs of a particular tribe. Absent a statute on point (which is almost always the case with tort law), tribal courts apply tribal customs to decide cases. And where those customs are not known to the court, the court asks important members of the community to provide their opinion. There is no general code governing tort with clear articulations of tribal government views on negligence, products liability, battery, or otherwise. Nor is there an established body of tribal case law delineating the contours of tribal common law. Without those customs being written down or communicated before interactions giving rise to a dispute, the imposition of tort liability on nonmembers is problematic. The issue is not just whether some norm of tribal law will be applied to a dispute; the question is what norm of, say, Seminole Nation law will be applied.

Second, tribal courts may consult with elders or councilors in different quantities, with different frequencies, and with little opportunity for advocates to argue or be informed about how such elders decide what customs should apply in a given case.

Finally, the same dynamic draws into question the independence of tribal judicial systems. Where important rules of decision reside in tribal customs as

communicated by tribal elders, even if judges are independent, the really important decisions on tribal law may be made by tribal elders with no obligations of independence. These features of tribal law may be vital for maintaining the unique cultures and traditions of Native American tribes, but they do not make an appropriate means to broadly regulate nonmembers.

The Seminole Nation has one of the best-developed tribal codes in Oklahoma,[7] yet even its legal system implicates many of these concerns and fails to provide any foresight to nonmembers in the area of general tort law. The tribe is capable of many things in its government, but its courts are simply not set up to handle general tort regulation with any level of predictability or normalcy. This is not the kind of "other means" of regulation the *Montana* court could have contemplated for jurisdiction exercised because of the existence of a *consensual* relationship.

This Court should not impose a one-size-fits-all rule that results in a sudden expansion of tribal

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[7] Only around 11 of Oklahoma's 38 federally recognized tribes appear to have a tribal code dealing with a range of issues, and the Seminole Nation's code appears to have one of the widest breadths. Many other tribes have a small number of ordinances such as a gaming ordinance (necessary to conduct gaming under the Indian Gaming Regulatory Act), an elections ordinance, and perhaps a tax ordinance to cover sales tax and cigarette excise taxes. For some tribes, no codification of law could be located whatsoever.

jurisdiction where tribal courts are not prepared or set up to handle general tort regulation and where ordinary nonmembers may be haled into courts where legal norms are not well-established. The problems with such an approach would be particularly acute in jurisdictions like Oklahoma where tribes have no reservations but instead have jurisdiction on parcels of land – often commercially developed – interspersed with non-tribal land in a mutually dependent economy.

II. An Indian tribe's authority to exclude nonmembers from tribal lands does not provide a basis for the exercise of tort jurisdiction over nonmembers.

Respondents have suggested in passing that regardless of the applicability of *Montana*'s "other means" exception, their right to exclude nonmembers from tribal lands could provide "an alternative ground supporting the Fifth Circuit's ruling." Br. in Opp. 7 n.12. The United States has correctly pointed out during certiorari briefing that this argument was neither pressed nor passed upon in the court of appeals, U.S. Br. 11-12, and should not be considered here.

In any event, Respondents' position on this point is untenable. The right to exclude is nothing more than its name suggests: the power to deny nonmembers access to tribal land, including the power to remove a nonmember from tribal land and to set

conditions on entry. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). This Court has never suggested that the right includes the power to impose on nonmembers any and all conditions the tribe wishes to impose as a precondition to admittance to a tribal business.

To the contrary, the Court has explicitly held that the right to exclude has no effect on the general rule against tribal authority over nonmembers. *Plains Commerce Bank* v. *Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328 (2008) (explaining that while a tribe "may * * * exclude outsiders from entering tribal land * * * tribes do not, as a general matter, possess authority over non-Indians who come within their borders." (citations omitted)).

Likewise, the Court has held that tribes lack "inherent sovereign authority to exercise criminal jurisdiction over non-Indians," a holding that makes no sense if the right to exclude gives tribes carte blanche to impose sweeping conditions on admittance to tribal lands. See *Montana*, 450 U.S. at 565 (citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

So too for the Court's admonition that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. That holding too would be nonsensical if rather than

awaiting congressional delegation, a tribe could simply turn to its right to exclude whenever it wished to exercise jurisdiction over nonmembers.

Given all this, the right to exclude cannot be a standalone source of power untethered from the general rule against tribal jurisdiction over nonmembers and *Montana*'s narrow exceptions to that rule. Rather, the right to exclude nonmembers is simply one of several baseline sources for tribal power over nonmembers. See *Plains Commerce Bank*, 554 U.S. at 330 (describing all such exercises "as stem[ming] from [a] tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."). In other words, it forms one of the bases for the *Montana* exceptions; it is not a separate, standalone power tribes can deploy to exercise jurisdiction outside the scope of those narrow exceptions.

III. The burden should be placed on the tribe or tribal member to establish the necessity of tort jurisdiction.

Indian tribes have lost any "right of governing every person within their limits except themselves," *Oliphant*, 435 U.S. at 209, such that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S at 565. As a result, this Court has emphasized that a tribe can only exercise tribal jurisdiction to the extent strictly "necessary to protect tribal

self-government or to control internal relations" and that anything more "is inconsistent with the dependent status of the tribes." *Id.* at 564.

Because any exercise of jurisdiction over a nonmember must be an exception to the general rule against such jurisdiction, the initial burden in cases like these should be on the tribe or tribal member to establish as a threshold matter that the tribal court's exercise of tort jurisdiction is necessary to protect tribal self-government or to control internal relations. See, *e.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (describing "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

Given that adjudication of tort claims involving nonmembers has traditionally occurred in state and federal courts, it is difficult to conceive how a tribe could now establish that the exercise of such jurisdiction is newly necessary to safeguard core sovereign prerogatives. In fact, the explosion in the size and diversity of tribal commercial enterprises and revenues – an explosion driven by commerce with nonmembers – has occurred in the absence of any widespread attempt to exercise tribal jurisdiction over nonmember defendants in civil matters.

IV. Nonmembers engaged in commercial dealings on tribal land must expressly consent to tribal court jurisdiction.

Even where a tribe or tribal member has established that exercise of tort jurisdiction is necessary, the first *Montana* exception should be limited to instances where (1) the nonmember engaging in commercial dealing with the tribe expressly consents to being subject to tribal court jurisdiction for tort claims, and (2) the tort claim has a close nexus to the commercial dealing.

Express consent is critical for all the reasons described in Part I above. Given the opaqueness of tribal tort law, it is all but impossible for a nonmember to impliedly give knowing consent to such law. Consent should thus be limited to instances where the nonmember has been afforded an opportunity to give considered, explicit consent – instances such as agreement to a forum selection clause in a contract.

The exception should not encompass instances where a nonmember is alleged to have impliedly consented to tribal court jurisdiction merely by doing business with a tribe or one of its members. This Court has in fact repeatedly rejected the argument that "any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him," *Duro* v. *Reina*, 495 U.S. 676, 695 (1990), and should extend that principle to tribal civil jurisdiction.

Recognition of implied consent would be particularly problematic in a jurisdiction like Oklahoma, where innumerable tribal businesses do business with nonmembers on innumerable scattered parcels of tribal land. If just buying coffee and gas at a tribal convenience store counts as implied consent, citizens of a state like Oklahoma will find themselves suddenly subject to a dizzying array of tribal laws in a dizzying array of tribal courts.

V. State courts provide an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not.

State and federal courts have always provided an adequate and fair forum for resolution of tort claims between state citizens who are members of tribes and state citizens who are not. The decision below upends that longstanding framework and will result in significant legal uncertainty in states like Oklahoma.

It is hard to conceive of any other jurisdiction in the developed world where a citizen of one sovereign could be potentially subject to tort liability in the courts of nearly 40 different sovereigns, applying 40 different bodies of law – but that could be the case in Oklahoma if the decision below is not reversed. Thus, as a matter of policy, the decision below injects uncertainty that is all but certain to stifle the impressive growth of tribal economies as nonmembers wrestle

with how to protect themselves from lawsuits in tribal courts.

Additionally, the decision undermines Congress's policy – embodied in 28 U.S.C. § 1441 – of favoring adjudication in neutral tribunals by allowing a defendant sued in the courts of a sovereign to which the plaintiff belongs and the defendant does not to remove the case to a court of a sovereign to which both parties belong. It is difficult to conceive of how a tribal member could be prejudiced by having to litigate their tort claim in a tribunal of a sovereign of which he or she is a citizen – that is, state or federal court. Diversity jurisdiction is not built on the notion that state courts are inherently biased against non-citizens (they are not). Rather, diversity jurisdiction simply recognizes that there is something to be said for eliminating any questions about the fairness of the local forum. The same is true in the tribal context.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1496

IN THE

Supreme Court of the United States

DOLLAR GENERAL CORP. AND DOLGENCORP, LLC,
Petitioners,

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For The Puyallup Tribe Of Indians; Southern Ute Indian Tribe; Navajo Nation; Mashantucket Pequot Tribal Nation; Sac And Fox Nation Tribal Court; Big Valley Band Of Pomo Indians; Blue Lake Rancheria; Chemehuevi Indian Tribe; Chicken Ranch Rancheria Of Me-Wuk Indians; Rincon Band Of Luiseno Mission Indians; Santa Ynez Band Of Chumash Mission Indians; Shakopee Mdewakanton Sioux Community Tribal Court; Northwest Intertribal Court System; Southwest Intertribal Court of Appeals; American Indian Law Center, Inc.; The Michigan Tribal State Federal Judicial Forum; And National American Indian Court Judges Association As Amici Curiae In Support Of Respondents

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INTERESTS OF THE AMICI CURIAE[1]

The Puyallup Tribe of Indians, Southern Ute Indian Tribe, Navajo Nation, Mashantucket Pequot Tribal Nation, Blue Lake Rancheria, Chemehuevi Indian Tribe, and Rincon Band of Luiseno Indians are federally recognized Indian tribes with active court systems regularly handling cases involving both Indians and non-Indians. These tribes have a strong and direct interest in seeing that companies that choose to do business within their reservations obey tribal laws and are susceptible to suit in tribal courts if they harm tribal members.

The Shakopee Mdewakanton Sioux Community Tribal Court and the Sac and Fox Nation Tribal Court have an interest in ensuring they can continue to hear cases involving nonmembers for claims arising within the courts' jurisdiction.

The Northwest Intertribal Court System (NICS), the Southwest Intertribal Court of Appeals (SWITCA), and the American Indian Law Center, Inc. (AILC) are non-profit organizations, the latter associated with the University of New Mexico School of Law, which provide judicial services, such as well-trained trial and appellate judges and publication of tribal laws and court procedures, to more than 28 tribes on the west coast and in the western states.

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[1] The parties have given their blanket consent to amicus briefs in support of either party and this consent has been noted on the docket. No counsel for either party authored this brief in part or in whole and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae described above, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Michigan Tribal State Federal Judicial Forum is an ongoing forum to foster working relationships among all of Michigan's court systems. Members include 12 tribal judges and 12 state judges.[2] The National American Indian Court Judges Association is a non-profit membership organization of present and former tribal court judges. These organizations have helped tribal courts become exemplary courts in their areas and strongly support the continuation of tribal jurisdiction in cases such as this one.

The Chicken Ranch Rancheria of the Me-Wuk Indians, Big Valley Band of Pomo Indians, and the Santa Ynez Band of Chumash Indians are federally recognized tribes in California who are currently in the process of establishing tribal court systems and have a similar interest in preserving the jurisdiction of tribal courts.

SUMMARY OF ARGUMENT

Petitioners ask this Court to establish a rule barring any tribal court from exercising civil adjudicatory jurisdiction over any nonmember defendant who does not expressly consent to the exercise of that jurisdiction, or alternatively to hold that tribal courts lack such jurisdiction over tort claims. Petitioners' request relies on unfounded fears about tribal courts, and if granted would have harmful effects on the administration of law throughout Indian country. This brief seeks to provide the Court with a more accurate understanding of tribal courts today, including their

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[2] There are also three federal members of the forum (a federal magistrate judge and two Assistant U.S. Attorneys who work on tribal matters) who did not vote on the decision to join this brief because it involves a pending federal case.

strong working relationships with state and federal courts.

Petitioners' position has no basis in this Court's approach to tribal civil jurisdiction. In limiting tribal regulatory jurisdiction over non-Indians *on non-Indian fee land*, the Court recognized two situations in which a tribe could have jurisdiction over a nonmember. One situation is when the tribe regulates "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). The other is conduct that "threatens or has some direct effect on ... the health and welfare of the tribe." *Id.* at 566. Here the action occurred on tribal trust land, over which the Court in *Montana* "readily agree(d)" that the tribe retained regulatory authority. *Id.* at 557; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Assuming that the *Montana* framework applies even to tribal land, this case fits easily within the consensual relationship exception, as the Court of Appeals held. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173-74 (5th Cir. 2014). Furthermore, defendants' alleged actions—employing a store manager who sexually molested a tribal member child— seriously threaten the tribe's ability to protect the health and welfare of its members. *See Montana*, 450 U.S. at 566.

In the face of this straightforward exercise of tribal jurisdiction under *Montana*, Petitioners and their supporting amici urge the Court to adopt a categorical rule divesting tribes of jurisdiction over virtually all tort claims against all nonmembers, even those that occur on tribal trust land. Petitioners

argue that because some tribal courts may be deficient, no tribal courts, including those of the Mississippi Band of Choctaw Indians, should have the power to hear tort cases against nonmembers who do not specifically agree to tribal court jurisdiction. Petitioners cannot argue that the Mississippi Choctaw tribal court's handling of this case is inadequate; the Choctaw court system is highly developed and the decision of the Mississippi Choctaw Supreme Court is thorough and impressive. Indeed, the amicus brief of the South Dakota Bankers Association describes the Mississippi Band of Choctaw Indians as having a "well-developed court system." *See* Br. Amicus Curiae of the South Dakota Bankers Ass'n in Supp. of the Pet'rs at 5 (citing Harvard Project on American Indian Economic Development). Many other tribes, including the amici here, also have similarly sophisticated and accessible judicial systems.

Petitioners support their cramped view of tribal jurisdiction by relying on what they claim to be historical views of tribal authority, dating predominately from the 19th century. Br. for the Pet'rs at 24-36. Yet at least since the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (IRA), Congress and the Executive Branch, as well as this Court, have repeatedly supported the revitalization and expansion of tribal governments in general, and tribal courts in particular.

The categorical prohibition Petitioners propose was considered and rejected in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855 (1985), where this Court unanimously concluded that a tribal court's exercise of civil subject-matter jurisdiction over non-Indians "is not automatically foreclosed, as an extension of *Oliphant* would require." Indeed, the

Court in *National Farmers Union*, noting the difference between tribal civil and criminal jurisdiction, quoted an opinion of the Attorney General upholding the civil adjudicatory jurisdiction of the Choctaw Tribe of Oklahoma:

> But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.

Id. at 854-55 (quoting 7 Op.Atty.Gen. 175, 179-181 (1855)).

Petitioners next argue that tribal tort law is unknowable because it might include tribal customary law. But they do not argue that tribal customary law will be used in this case, nor do they provide any reason to believe that such law, if applicable, would be either hidden or harmful. To the contrary, published decisions from a diverse array of tribal courts show tribal judges apply familiar legal principles that result in fair outcomes for all litigants, including nonmembers.

The picture of tribal courts and tribal law painted by Petitioners and amici in support of their position is inaccurate. Tribal courts, supported by nearly a century of federal laws and policies, have evolved to have fair and accessible procedures as well as substantive law, including tort law, that is familiar and understandable. Tribal law is often readily available on the internet through a variety of sources and databases. Litigants in tribal courts, whether tribal members or not, are afforded due process, as required by tribal laws and the Indian Civil Rights

Act, 25 U.S.C. §§ 1301-1304 (ICRA), and tribal courts apply familiar due process principles in a range of circumstances.

Finally, Petitioners also overlook the very good relations that exist between tribal courts and state and federal courts. Statutes and court rules in states where there are Indian tribes generally require state courts to recognize tribal court judgments as a matter of comity, thus enforcing them if the tribal court had jurisdiction and there was no violation of due process. This is also the practice of federal courts in the Ninth and Tenth Circuits, where the majority of Indian reservations are located. A few states treat judgments of tribal courts as they would judgments of other state courts, granting them full faith and credit, but still making sure constitutional rights are not infringed. *See* Part III-A. In both cases, comity and full faith and credit, the state and federal courts provide a second layer of due process review, further ensuring fairness to all defendants, Indian or non-Indian. In addition, most states with large Indian populations have a forum for state and tribal judges to meet and work out any issues there may be between the court systems. These forums allow state and tribal judges to ensure that jurisdictional issues will not inhibit the administration of justice. *See* Part III-B.

This Court has long recognized, "The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system . . . ." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987). Since 1934, when the IRA encouraged tribes to draft their own laws and establish modern governments, Congress, the Executive Branch, and this Court have all given support for the growth and development of tribal courts. The circumstances of

this case provide no cause for the Court to reverse that direction.

ARGUMENT

I. SUPPORTING TRIBAL COURTS IS AN INTEGRAL PART OF THE MODERN FEDERAL POLICY OF TRIBAL SELF-DETERMINATION.

A. Congressional and Executive Policy towards Tribes and Tribal Courts Supports Tribal Jurisdiction.

Contemporary federal laws and policies support Indian tribal courts, including tribal jurisdiction over nonmembers. This is the culmination of nearly a century of federal policy evolution. In 1934, Congress passed the Indian Reorganization Act (IRA), which encouraged tribes to adopt their own constitutions and enact their own laws. 25 U.S.C. § 476(a). As this Court has recognized, this reform effort was part of the broader national goal of reviving tribal self-determination and encouraging tribal governance. *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically").

Tribal law reform efforts have continued robustly throughout the last five decades because federal self-determination policies, in place since the 1960s, have encouraged tribes to retake control of and build their governmental structures. In 1970, President Nixon announced the federal government's support for tribal self-governance decisively in his Message to Congress, in which he urged Congress to perpetuate the federal trust relationship with tribes, facilitate a

transition to tribal control of federal programs, and support the development of tribal political institutions.[3] Every President since Nixon has likewise embraced self-determination policies.[4]

Consistent with these policies, Congress has provided funding and technical assistance for tribal court systems. *See* Indian Tribal Justice and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651-3682; Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993). In recent years, Congress has gone even further: it has restored categories of inherent tribal criminal jurisdiction that the Court had rejected. In 1991 Congress amended the Indian Civil Rights Act to affirm that tribes have inherent criminal jurisdiction over nonmember Indians, altering the result in *Duro v. Reina*, 495 U.S. 676 (1990). 25 U.S.C. § 1301(2). Most recently, when it reauthorized the Violence Against Women Act in 2013, Congress recognized tribal inherent authority to prosecute non-Indians who commit dating, sexual, and domestic violence crimes on tribal land. 25 U.S.C. § 1304 (partially overturning *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

The Executive Branch has likewise embraced policies of supporting and strengthening tribal judicial systems. In 1993, the Bureau of Indian Affairs (BIA) established the Tribal Justice Support Program, which provides training and technical assistance to tribal courts. *See* 25 U.S.C. § 3611. Most

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[3] Richard Nixon, Special Message to Congress (July 8, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2573.

[4] *See e.g.*, President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983); President William J. Clinton, Remarks to American Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); *available at* www.presidency.ucsb.edu.

recently, in 2014, the Attorney General issued a set of principles for working with federally recognized tribes and emphasized that "stable funding at sufficient levels for essential tribal justice functions is critical to the long-term growth of tribal institutions."[5] In 2010, DOJ began awarding more than $350 million to tribes to address criminal and public safety issues.[6] Through its Bureau of Justice Assistance, DOJ has provided grant funding to nearly three hundred tribes to enhance their judicial systems.[7] As a result of this federal support, tribes are several decades into the process of making their law enforcement and judicial systems responsive to the broad range of issues arising in Indian country today, including those involving nonmembers.

B. Decisions of this Court Have Also Supported the Development of Tribal Courts.

This Court has also played a crucial role in supporting the development of tribal courts. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that state courts lacked jurisdiction over a case brought by a non-Indian against tribal members for a claim that arose within the Navajo reservation. First, the Court discussed the IRA's policies of encouraging

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[5] *See* Attorney General Guidelines Stating Principles for Working with Federally Recognized Tribes, 79 Fed. Reg. 239 (Dec. 12, 2014) (AG Order No. 3481-2014).

[6] U.S. Dep't of Justice, Coordinated Tribal Assistance Solicitation: Fiscal Year 2015 Factsheet, *available at* www.cops.usdoj.gov/pdf/CTAS/2015_ctas_fact_sheet.pdf.

[7] U.S. Dep't of Justice, Bureau of Justice Assistance, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (2005), *available at* law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

"tribal governments and courts to become stronger and more highly organized." *Id.* at 220. Next, the Court made specific mention of positive developments in the Navajo judicial system, noting, "[t]he Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel." *Id.* at 222. The Court concluded that allowing Arizona state courts to exercise jurisdiction over the case would infringe on the Tribe's right to make its own laws and be ruled by them. As a result, the only forum available to the non-Indian plaintiff was the Navajo judicial system. The Court found it "immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223. The Court concluded by stating that its own cases had "consistently guarded the authority of Indian governments over their reservations. . . . *If this power is to be taken away from them, it is for Congress to do it.*" *Id.* (emphasis added).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court held that tribal courts are appropriate forums to hear claims under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (ICRA). The Court held that federal courts have no jurisdiction to hear ICRA claims (other than petitions for habeas corpus) in part based on the long-established recognition of tribes as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Id.* at 55 (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). The Court construed the ICRA and other modern federal statutes as "promot[ing] the well-established federal 'policy of furthering Indian self-government.'" *Id.* at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Court in *Santa Clara* reasoned:

"Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians *and non-Indians*." *Id.* at 65 (emphasis added).

Since *Santa Clara*, tribal courts, supported by the Congressional and Executive Branch policies described above, have expanded and evolved rapidly. In *Santa Clara*, the Court noted that there were "287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976." *Id.* at 65 n.21 (citing 1 American Indian Policy Review Commission, Final Report 5, 163 (1977)). In 2005, a DOJ report found that number had increased to 175 tribal courts, 103 of which had their own appellate courts.[8] Today, there are 567 federally recognized tribes and more than 300 tribal courts.[9] *Santa Clara*'s holding, which made tribal courts the forum of first resort for ICRA violations, contributed to this expansion.

This Court's tribal court exhaustion doctrine, articulated in *National Farmers Ins. Co.*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), has also helped foster tribal court development. *National Farmers* involved a tort case brought by a tribal member against nonmember

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[8] U.S. Dep't of Justice, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country at 20, *available at* www.bjs.gov/content/pub/pdf/ctjaic02.pdf.

[9] The National American Indian Court Judges Association has compiled a list of over 300 tribal courts. *See also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 71 (2013) (estimating the number of tribal courts to be approximately 300).

defendants, and the Court required the nonmembers to exhaust their remedies in tribal court: "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. *Iowa Mutual* applied the doctrine in another tort case against a nonmember defendant, and clarified that exhaustion should include tribal appellate review: "The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." 480 U.S. at 16-17. *Iowa Mutual* also expressed strong support for the presumption that tribes retain civil jurisdiction over nonmember activities on reservation lands "unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.

In sum, this Court has played a complementary role to that of Congress and the Executive Branch in the context of civil jurisdiction. The Court has recognized tribal judicial authority to hear disputes between nonmembers and tribal members, *Williams*, 358 U.S. at 223, and encouraged tribal courts to consider the extent of their jurisdiction in cases involving tort claims against nonmembers. *National Farmers*, 472 U.S. at 855-57; *Iowa Mutual*, 480 U.S. at 16-18. In *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438, 454-59 (1997), the Court adopted a context-sensitive framework for assessing whether tribes have civil jurisdiction over nonmember activity, even when claims arise on non-Indian lands, which is not the situation presented here. *See also Plains*

Commerce Bank v. Long Family and Cattle Co., 554 U.S. 316, 327-30 (2008) ("[T]ribes retain sovereign interest in activities that occur on land owned and controlled by the tribe") (quoting *Nevada v. Hicks*, 533 U.S. 353, 392 (2001) (O'Connor, J., concurring)); *see also id.* at 336 ("the tribe may quite legitimately seek to protect its member from noxious uses" caused by nonmember conduct even on fee lands).

The Petitioners, however, urge the Court to end its support for the growth and development of tribal judicial systems by categorically prohibiting all cases in tribal courts against nonmembers or alternatively those sounding in tort law. As discussed below, the fears Petitioners seek to sew about the unknowability of tribal tort law and the unfairness of tribal courts are unfounded, both in this case and in general. Therefore, there is no justification for the Court to contravene congressional and executive policies as well as the Court's own approach to tribal civil jurisdiction by declaring one category of civil cases to be prohibited in all tribal courts.

II. PETITIONERS' CONCERNS ABOUT THE INADEQUACY OF TRIBAL COURTS AND UNFAMILIARITY OF TRIBAL LAW ARE UNFOUNDED.

A. Tribal Courts Are Well Run and Their Laws are Readily Accessible.

The Mississippi Choctaw Band's Civil Court decided this case initially, and then the Choctaw Supreme Court heard the appeal. The Choctaw Supreme Court decision is thorough and closely reasoned, written by a judge who is also a law professor. *See Doe v. Dolgencorp*, No. CV-02-05, Miss. Band of Choctaw Indians S.Ct. (Feb. 8, 2008) (opinion by Judge Frank Pommersheim, a University of South

Dakota law professor). The Choctaw Band's law and courts are discussed in detail in the Respondent's brief. Information about the Tribe's judicial system is also readily available on-line.[10] The Petitioner and amici do not and cannot argue that the Choctaw court system is inadequate or unfair.

The well-developed Mississippi Choctaw court system is not unusual. Amici tribes, and many other tribes, have established similar tribal court systems. For example, Amicus Puyallup Tribe has a trial court currently served by three judges. Puyallup Judicial Code § 4-16-040.[11] The Puyallup Judicial Code requires that all Tribal Court judges must be members of a state bar, hold a Juris Doctor degree, be members of a federally recognized Indian Tribe, and be free from convictions involving "dishonesty or moral turpitude." *Id.* § 4-16-160.

A litigant dissatisfied with a decision of the Puyallup trial court may file an appeal. The Puyallup Court of Appeals is provided through a contract with the Amicus Northwest Intertribal Court System (NICS), an inter-tribal court system founded in 1979. For many of its participating and member tribes, NICS provides both trial and appellate judges, many of whom are members of the Washington bar and not infrequently law professors, like the judge who wrote the Tribal Supreme Court opinion in this case. NICS plays a major role in assuring the quality of tribal courts in the West. It serves some 18 tribes in the Washington, Oregon, California area. Apart from the

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[10] The Mississippi Band of Choctaw Indians – Tribal Code, *available at* ttp://www.choctaw.org/government/court/code.html.

[11] Laws of the Puyallup Tribe of Indians, *available at* www.codepublishing.com/WA/puyalluptribe/.

Puyallup, some of the best known are the Tulalip, Chehalis, Klamath, and Muckleshoot tribes. Appellate opinions issued by NICS-administered courts are published in a reporter titled NICS Tribal Appellate Court Opinions, all thirteen volumes of which are available online, searchable, and contain an index by subject matter and tribe.[12]

Amicus Southern Ute Indian Tribe has a similar system and belongs to a similar intertribal judicial organization, the Southwest Intertribal Court of Appeals (SWITCA), which provides appellate courts for twelve tribes and pueblos in Arizona, Colorado, New Mexico and Texas including the Jicarilla Apache, the Ak Chin, Fort Mojave, Zuni Tribe, Santa Clara Pueblo and three other pueblos. The SWITCA judges are all licensed attorneys who have been practicing law for at least five years, and they include two law professors. They operate under a set of Appellate Rules published on the internet by SWITCA, and their decisions are indexed and reported in print and sent to member tribes, attorneys practicing in tribal courts and law school libraries for public use.

By using intertribal associations like SWITCA and NICS, tribes like the Puyallup Tribe and Southern Ute are able to provide an impartial appellate review of tribal court decisions by distinguished and experienced attorneys.

Amicus Navajo Nation's Judicial Branch has eleven judicial districts and a full-time Supreme Court. The Navajo Nation also has two administrative hearing bodies, the Office of Hearings and Appeals and the

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[12] NICS Tribal Court Appellate Opinions, *available at* www.codepublishing.com/wa/nics.

Labor Commission. To practice in Navajo Nation courts, one has to be a member in good standing of the Navajo Nation Bar Association (NNBA), which includes a requirement to pass the Navajo Nation Bar Examination. Members of federally recognized tribes may sit for the bar examination if they are graduates of a four-year college or American Bar Association accredited law school, or have completed a certified paralegal training program or equivalent. Non-tribal members have to be state-licensed attorneys and graduates of accredited law schools.[13]

In addition, the law applied by tribal courts is written and publicly available. There is a West Tribal Law Reporter published in hard copy, and an increasing number of online legal information providers have tribal law databases (comprising decisional and statutory law), including WestlawNext, Lexus Advance, and VersusLaw.[14] The Mississippi Band of Choctaw Indians,[15] the Puyallup Tribe,[16] the Navajo Nation,[17] and many other tribes have tribal codes that are in these databases or

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[13] *See* Navajo Nation Bar Ass'n Bylaws IV.B-C, *available at* http://www.navajolaw.org/New2008/bylaws.htm.

[14] WestlawNext includes West's Tribal Law Reporter (reporting cases for twenty-one tribal courts), Oklahoma Tribal Court Reports (reporting cases for twenty-three tribal courts), and West's Mashantucket Pequot Reports.

[15] Choctaw Tribal Code, *available at* http://www.choctaw.org/government/court/code.html.

[16] Puyallup Tribal Code, *available at* www.codepublishing.com/WA/puyalluptribe/.

[17] The Navajo Nation Code is available on Westlaw in West's Tribal Law Reporter and also available on CD ROM. *See* Judicial Branch of the Navajo Nation, *Navajo Nation Code*, http://www.navajocourts.org/code.htm.

otherwise posted on the internet. For tribes that choose not to publish their tribal codes on the internet, like the Southern Ute Tribe, laws and judicial opinions are available from the tribal courts, designated tribal offices and at local public libraries.[18]

The content of these tribal court decisions and codes are also very familiar to any practitioner trained in general legal principles. While it is not possible to survey the substance of all tribal laws here, many tribal codes are modeled after or incorporate statutes of other jurisdictions. *See, e.g.*, *Tracy v. Superior Ct.*, 810 P.2d 1030, 1033 n.3 (Ariz. 1991) (en banc) ("The Navajo Uniform Act is substantially identical to Arizona's Uniform Act."); Cohen's Handbook of Federal Indian Law § 4.05[8] n.63, at 277 (Nell Jessup Newton ed., 2012) [hereinafter Cohen] (Code of Eastern Band of Cherokees adopting North Carolina civil rules "as a matter of comity to promote respect for the Cherokee Courts and to facilitate the practice of law in the Cherokee Courts"); *id.* at n.64, 278 (some tribes adopt federal rules of procedure for civil litigation). When there is a gap in the tribal code, tribal court judges are often instructed to apply state or federal law. *See* Choctaw Tribal Code § 1-1-4 ("Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi."); Southern Ute Tribal Code § 1-2-101(4) ("Where there is no law contrary, the common law of the United States . . . shall be the rule

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[18] Contact information for the Southern Ute Indian Tribal Court is available online. *See* S. Ute Indian Tribe, *Tribal Court*, www.southernute-nsn.gov/tribal-court/.

of decision . . . ."); *Winstone v. Old Kent Bank-Grand Traverse*, No. 98-04-127-CV, 2000 WL 35750179, at *1 (Grand Traverse Tribal Ct. Feb. 11, 2000) (tribal resolution "mandates that Michigan substantive law be adopted as tribal law to fill voids"). "By adopting federal or state laws, a tribe may be seeking to fill gaps in developing tribal law and to learn from the experience of other sovereigns." Cohen at § 4.05[8], 278; *see also Synowski v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 122, 124-25 (Grand Ronde Cmty. Ct. App. 2003). Especially in the area of commercial law, tribes are sensitive to the fact that providing uniform legislation can facilitate business on the reservation. Cohen at § 4.05[8] n.65, 278 (Confederated Tribes of the Grand Ronde Community adopting Oregon Commercial Code and contract laws unless in conflict with tribal law).

Because tribal courts, including the ones described above, are fair, accessible and familiar, they are also the forums of choice for tribal members, as well as many other reservation residents. Nonmembers are frequently plaintiffs in tribal courts, as well as defendants. And just as state residents often opt to file lawsuits in the courts of their home state, so too will tribal members prefer the court system of their governments. Furthermore, some tribal nations, such as the Navajo Nation, are so vast and remote that the nearest state court may be at least three hours away, whereas the closest Navajo district court is well within an hour's drive. Whether for reasons of familiarity, convenience, or comfort, reservation residents have the same forum selection interests as other litigants and should not be denied the use of their tribal courts.

B. Tribal Court Decisions Comport with Due Process of Law.

The Indian Civil Rights Act provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law . . . ." 25 U.S.C. § 1302(a)(8). The Act protects non-Indians as well as Indians, referring throughout to "any persons" within the tribe's jurisdiction. *See id.* § 1302. In cases applying the ICRA's due process guarantees, "judges and litigants rely almost exclusively on American jurisprudence . . . ." Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 75 (2013). A 2008 study of tribal court decisions applying the ICRA found: "Of the 120 cases involving an ICRA issue, tribal court judges cited federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent)." *Id.* The handful of cases (six) in which tribal courts refused to apply federal or state law fell into two categories: those involving tribal members in domestic dispute cases or those in which the tribal court determined that tribal law afforded *greater* protections for individual rights than were available under federal or state law. *Id.* After a review of hundreds of cases, Professor Fletcher concluded, "tribal courts announced, often as a matter of first impression, the tribal interpretation of 'due process' by reference to American cases." *Id.* at 77.

Any sample of these many tribal due process decisions shows tribal courts to be as protective of individual rights as federal or state courts. First, tribes apply familiar principles of due process in the context of personal jurisdiction and notice. Like states, many tribes codify the bases upon which they

will assert jurisdiction over non-resident defendants,[19] and then subject individual exercises of jurisdiction to due process review. Consistent with Professor Fletcher's general observations about due process in tribal courts, these decisions incorporate familiar principles and reasoning.

The Mashantucket Pequot Tribal Court, for example, hears many cases involving nonmembers as a result of its tort liability statute, which provides tribal court jurisdiction over tort claims against the Tribe's casino as well as other defendants including nonmembers. 4 M.P.T.L. ch.1 § 3(a). In *Barbosa v. Mashantucket Pequot Gaming Enter.*, 4 Mash. Rep. 269, 2005 WL 5740565 (Mash. Pequot Tribal Ct. 2005), the court considered whether it had personal jurisdiction in a case involving proper service on nonmember defendants. It upheld its jurisdiction, but only after finding the defendants had been personally served at their homes, in compliance with both Pequot and New Hampshire law. *Id.* at 274. In another case involving a nonmember defendant (in this case, someone whom the tribe was suing), the Pequot court held the service was inadequate, and dismissed the claim against the nonmember defendant. *Mashantucket Pequot Gaming Enter. v. Goldman*, 5 Mash. Rep. 135, 2009 WL 173098 (Mash. Pequot Tribal Ct. 2009). The approach to personal

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[19] *See, e.g.*, Law & Order Code of the Shoshone and Arapaho Tribes of the Wind River Reservation § 1-2-3 (Personal Jurisdiction); Code of the Sac & Fox Tribe of the Miss. in Iowa § 5–4102 (Personal Jurisdiction of Tribal Court); Navajo Nation Code Ann. tit. 7, § 253a (Long-Arm Civil Jurisdiction and Service of Process Act); Tribal Code of the Poarch Band of Creek Indians § 4-1-1 (Personal Jurisdiction). This partial but representative list was culled from a search on Westlaw's Tribal Codes database. There are many more similar provisions.

jurisdiction and notice in these cases is indistinguishable from that which governs jurisdiction in state or federal courts. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice comports with due process if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action").

Tribal courts also commonly apply familiar due process principles in the context of procedural rights. In *Synowski v. Confederated Tribes of Grand Ronde*, the Grande Ronde Court of Appeals considered whether a non-Indian fired by the tribe had been denied due process due to inadequate notice and the inability to secure the assistance of counsel at his own expense. The court noted that Synowski's right to due process derived from the ICRA and not the United States Constitution, but that the ICRA's purpose was to provide broad constitutional rights against "arbitrary and unjust actions of tribal governments.'" 4 Am. Tribal Law at 124-25 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978)) (quotation marks omitted). The court also clarified that while tribes are free under the ICRA to develop their own due process principles consistent with tribal traditions, no tribal tradition or custom was put at risk "if the general principles of due process under the United States Constitution are applied in this case." *Id.* The court then applied the test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), and held that the due process standard articulated there applied to Synowski's case, entitling him to counsel at his employment hearing. 4 Am. Tribal Law at 126-30.

In addition, as discussed in Part III below, in order for tribal court decisions to be recognized by state and

federal courts (which is necessary for enforcement of judgments in virtually all cases involving nonmember defendants), due process requirements must be met. This is so whether state courts recognize tribal decisions pursuant to full faith and credit or comity principles. There are therefore often multiple layers of due process review in cases involving tribal jurisdiction over nonmembers—the tribe's own laws of personal jurisdiction and notice; the tribe's and the ICRA's due process guarantees; and, if state or federal court recognition is sought, further due process review in those courts.

C. Tribal Tort Law Applies Familiar Principles.

In addition to their general worries about the fairness of tribal courts and tribal law, Petitioners and their amici focus on the supposedly unique qualities of tort law—that it is "fundamentally different" from other law and is generally not codified. Pet. Op. Br. at 52. Tort law is typically developed through common law, not statutory law, and while it may vary between different states – compare Louisiana and Mississippi or either with New York – any jurisdiction would recognize the alleged facts here as a tort. Moreover, many tribes, like the Puyallup Tribe, have a tribal tort claims act broadly waiving tribal sovereign immunity for suits in tribal courts to allow an individual (tribal member or nonmember) to file an action for money damages against the Tribe. *See* Puyallup Tribal Tort Claims Act, Puyallup Tribal Code §§ 4.12.030-.040. The Puyallup Tribe protects itself with an insurance policy, as many municipalities do. The Puyallup Tribal Tort Claims Act is modeled substantially on the Federal Tort Claims Act. The Navajo Nation and many other tribes also have statutes waiving

sovereign immunity for certain tort claims against the tribe and its officials. *See, e.g.*, Navajo Nation Code Ann. tit. 1, § 554 ("Exceptions to the general principles of sovereign immunity").

Nothing in the underlying case in the Choctaw tribal courts indicates that the tort law applied by the tribe in this case would be foreign or strange. The plaintiff's suit is based on allegations that a Dolgencorp employee who managed a Dolgencorp store located on trust land within the reservation sexually molested a 13-year-old tribal member boy. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014). The plaintiff's tort claims arising from these actions are typical and familiar, and borrow from Mississippi state law: vicarious liability for the employee's actions; negligent hiring, training and/or supervision of the employee; and damages resulting from the sexual assaults. *See id.*

A survey of other tort cases emerging from tribal courts likewise does not support the Petitioners' aspersions. These decisions make clear that tribal court decisions follow discernible principles and apply the same analogical and inductive reasoning other common law courts use, not always to the benefit of the Indian party. Tribal courts can be quite conservative. In *Winstone*, tribal member plaintiffs sued a non-Indian bank and other defendants, alleging various tort claims arising from the defendants' repossession of plaintiffs' property. The tribal court granted summary judgment for the non-Indian defendants, concluding that they had a right to repossess the property. 2000 WL 35750179, at *1. The Tribal Council had adopted a resolution that "*mandates* that Michigan substantive law be adopted as tribal law to fill voids that might otherwise exist in

tribal law. Among those . . . is the *Uniform Commercial Code* . . . ." *Id.* (emphasis in original). The court applied the relevant provisions of the UCC, which permit "peaceful self-help repossession" and decided in favor of the non-Indian defendants. *Id.* The substantive law, jurisdictional rules, and outcome of this and many similar cases belie concerns about the inscrutability or unfairness of tribal law.

Similarly, in a tort case brought by a nonmember plaintiff, the Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation applied the same standard of review that would govern in Montana state courts to a case involving evidence and jury instructions. *Smith v. Salish Kootenai College*, 5 Am. Tribal Law 34, 39 (Ct. App. of Confederated Salish & Kootenai Tribes 2004). "When a standard of review has not been established by tribal law or prior court decision, we may look to the standard of review adopted by other courts." *Id.* A third case, this one from the Navajo Nation Supreme Court, involves interpretation of an insurance contract involved in a tort case. In *Benalli v. First Nat'l Ins. Co. of Am.*, 1 Am. Tribal Law 498, 7 Navajo Rptr. 329 (Navajo 1998), the court addressed whether the tribal member plaintiff could recover under multiple insurance policies for uninsured motorist coverage from the non-Indian insurance company. After stating that only Navajo Nation law applied to the question, the court nonetheless noted that "[t]he parties anticipated that the policy would be determined in accordance with the New Mexico insurance law climate. Accordingly . . . we will look closely at New Mexico decisions for guidance to assure the legitimate expectations of the parties." *Id.* at 505. Because the parties would have understood that their contract was to be interpreted consistent

with New Mexico legal principles, the court applied its own common law in a similar manner, and the plaintiff prevailed.

At a higher level of generality, Petitioners' effort to depict tribal common law as something frightening or alien to American legal practice is fundamentally mistaken. As former Chief Justice Tom Tso of the Navajo Supreme Court explained:

> When we speak of Navajo *customary* law . . . many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called "common law." Our common law is comprised of customs and long-used ways of doing things. It also includes court decisions recognizing and enforcing the customs or filling in the gaps in the written law.

Cohen § 4.05[4], at 273 (quoting Tom Tso, *The Process of Decision Making in the Tribal Courts*, 31 Ariz. L. Rev. 225 (1989)). Justin Richland, whose work is cited by Petitioner for the proposition that tribal law is unknowable, *see* Pet. Op. Brief at 6-7, in fact has concluded that tribal courts are incorporating customary law in ways that comport with the due process expectations of the parties. *See* Justin Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* 50-51 (2008) (describing Hopi decision balancing fairness and notice to litigants with priority of incorporating Hopi law). Similarly, Professor Matthew Fletcher reviewed tribal court decisions applying tribal common law, and concluded that in cases involving non-Indians, "there is *no* instance where a tribal court has chosen to depart in an unusual manner from the established common law of other jurisdictions . . . ." Matthew L.M. Fletcher, *Toward a Theory of Intertribal and*

Intratribal Common Law, 43 Hous. L. Rev. 701, 726 (2006) (emphasis added). Petitioners' fears about tribal common law have no basis in what is actually happening in contemporary tribal courts, and should not be relied on to divest tribes of civil jurisdiction.

III. STATE AND FEDERAL ENFORCEMENT OF TRIBAL COURT JUDGMENTS RESPECT TRIBAL COURTS' AUTHORITY AND PROTECT NONMEMBER DEFENDANTS.

Through legislation and court decisions, states generally recognize tribal court judgments based either on comity or, in some states, full faith and credit. Consequently, they enforce those judgments (and only those) where they find that the tribal court afforded due process to the litigant. The Ninth and Tenth Circuits have similarly held that tribal court judgments should be recognized and enforced based on comity. These practices not only recognize the competence and authority of tribal courts, but also provide important additional protections because judgments against non-Indian defendants ordinarily require enforcement by state or federal courts.

A. States and the Courts of Appeal for the Ninth and Tenth Circuits Recognize Tribal Court Judgments as a Matter of Comity or Full Faith and Credit.

Many states grant at least comity to tribal court judgments. Cohen at § 7.07[2][b], 664. Among these, Arizona is home to over twenty federally recognized tribes. Despite the position taken by its Attorney General in the Oklahoma amicus brief, Arizona requires its courts to recognize and enforce tribal court judgments if no party objects. Ariz. R. P. for Recognition of Tribal Ct. Civ. Judgments 5(a). If there is an objection, the court is directed to evaluate

whether the tribal court had jurisdiction and whether it afforded the complaining party due process. *Id.* 5(c). If the complaining party fails to show there was no jurisdiction or that he was not afforded due process, the courts are directed to enforce the judgment. *See also Tracy*, 810 P.2d at 1041 ("tribal laws are entitled to recognition on the basis of comity if they are otherwise in accord with Arizona's public policy" and "Arizona courts have consistently afforded full recognition to tribal court proceedings").

The State of Oklahoma has thirty-eight federally recognized tribes. Despite its brief to this Court, for over two decades Oklahoma court rules have provided that its district courts must "grant full faith and credit and cause to be enforced any tribal court judgment where the tribal court that issued the judgment grants reciprocity to judgments of [the state courts]." Okla. Stat. tit. 12, ch. 2, app., § 30. The Oklahoma Supreme Court has enforced this rule. *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994) The Oklahoma legislature has affirmed the court's power to issue standards for extending full faith and credit to the records and judicial proceedings of tribes. Okla. Stat. tit. 12, § 728.

The State of Washington, like Oklahoma, requires a reciprocal recognition by the tribes of judgments of the state courts. Washington has twenty-nine federally recognized tribes, including the Puyallup Tribe. The superior courts of Washington "shall recognize, implement and enforce" tribal court judgments unless the superior court finds that the tribal court issuing the judgment "(1) lacked jurisdiction over a party or subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of [state court

judgments and orders]." Wash. Super. Ct. Civ. R. 82.5.

California has over 100 federally recognized tribes. In 2014, the State enacted the Tribal Court Civil Money Judgment Act, which set forth procedures for applying for recognition and entry of a tribal court money judgment. Cal. Civ. Proc. Code §§ 1730-1742. Similar to other jurisdictions, the California law provides for enforcement of tribal court money judgments unless the California court finds that the tribal court lacked jurisdiction or did not provide due process. *Id.* § 1737(b). The California court may also decline to recognize the tribal court judgment on other equitable grounds (*e.g.*, fraud or cause of action violates public policy of the state or the United States). *Id.* § 1737(c).

Similarly, the courts of Alaska, South Dakota, Montana and Oregon all recognize tribal court judgments based on comity. *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999); *Red Fox v. Hettich*, 494 N.W.2d 638, 641-42 (S.D. 1993) (quoting S.D. Codified Laws § 1-1-25); *Wippert v. Blackfeet Tribe of Blackfeet Indian Reservation*, 654 P.2d 512, 515 (Mont. 1982); *In re Marriage of Red Fox*, 542 P.2d 918, 921 (Or. Ct. App. 1975).

The States of New Mexico, Idaho, Iowa and Michigan go farther still in recognizing tribal court judgments. New Mexico is home to over twenty federally recognized tribes. Its Supreme Court has simply held that tribal laws are entitled to full faith and credit in New Mexico courts because tribes are "territor[ies]" under 28 U.S.C. § 1738. *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975). The State of Idaho has reached the same conclusion, granting full faith and credit to tribal judgments. *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho

1982). Iowa has done likewise, Iowa Code ch. 626D, as has Michigan, Mich. Ct. R. 2.615. Michigan's exemplary working relationship with its tribal courts is further detailed in a law review article by one of its supreme court justices. *See* Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. Det. Mercy L. Rev. 709 (1999).

The Court of Appeals for the Ninth Circuit has held that it will recognize tribal court judgments under rules of comity, if it finds the tribal court had jurisdiction and the defendant was afforded due process of law. *Wilson v. Marchington*, 127 F.3d 805, 809-12 (9th Cir. 1997); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140-52 (9th Cir. 2001) (refusing to recognize a tribal court judgment which the court of appeals concluded was unfair to a nonmember defendant). The Tenth Circuit will either apply comity or full faith and credit, in the same manner. *See Burrell v. Armijo*, 456 F.3d 1159, 1171-72 (10th Cir. 2006); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1065 (10th Cir. 2007) (noting that Tenth Circuit has not resolved whether comity or full faith and credit should be applied to enforcement of tribal court orders).

The laws, rules and practices surveyed above reveal several vitally important themes. First, states that have the most experience with tribal courts and legal systems recognize and provide a means for tribal court judgments to be enforced in state court. As the North Dakota legislature has explained, "Indian tribes in this state are considered the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state" and "[t]his policy and rule are to promote justice, to encourage better relations between the

tribes . . . and the state of North Dakota . . . ." N.D. R. Ct. 7.2.

Second, whether through comity or full faith and credit, the state and federal regimes provide a safeguard against contested tribal court judgments. Tribal court judgments will not be enforced if, after independent analysis, the tribal court lacked jurisdiction or did not provide due process. This exception to full faith and credit (or comity recognition) tracks the one applicable to other state and foreign court judgments and has been in place since at least 1877. *See Pennoyer v. Neff*, 95 U.S. 714, 729-33 (1877) (due process provides an exception to the requirement of full faith and credit). Because most, if not all, nonmember defendants will have the bulk of their assets located off-reservation, tribal court judgments against these defendants will usually be subject to this second layer of due process protection. Petitioners' fears of unlimited judgments by prejudiced tribal courts denying them due process are figments of their imaginations. They have the safeguard of the well-organized tribal appellate courts, and, upon enforcement action, of state and federal courts as well.

B. State - Tribal Judicial Forums Create Good Working Relationships Between State and Tribal Courts.

State sponsored meetings for tribal and state judges have increased knowledge and cooperation between their respective court systems. California has established a Tribal Court-State Court Forum, which is an advisory committee composed of both tribal court judges and state court judges. Its goal is to allow these judges to "come together *as equal partners* to address issues common to both relating to the recognition and enforcement of court orders that

cross jurisdictional lines, the determination of jurisdiction for cases that might appear in either court system, and the sharing of services between jurisdictions." [20] The New Mexico Tribal-State Judicial Consortium serves a similar purpose; its current projects involve "the Indian Child Welfare Act (ICWA), full faith and credit/comity . . . ."[21]

State and tribal courts have long worked together in Michigan, which first established a Tribal State Court Forum in 1992. The Forum's recommendations led to Michigan Court Rule 2.615, which authorizes state and tribal courts to accord full faith and credit to each other's orders, judgments and other judicial acts. Mich. Ct. R. 2.615. Another result of the Forum's work was to recommend that the legislature pass the Michigan Indian Family Preservation Act of 2012, Mich. Comp. Laws §§ 71213.1-.41, which further enhances the working relationship between state and tribal courts. In 2014, the Michigan Supreme Court established the Tribal State Federal Judicial Forum, resulting in twelve state and twelve tribal court judges convening regularly with federal officials. In addition, tax agreements entered into between the state and tribes in 2002[22] provide for significant tribal court involvement, and were negotiated by the Michigan governor and attorney general.

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[20] Cal. Tribal Ct.-State Ct. Forum, *Forum Overview* 2 (2014) (emphasis added), *available at* http://www.courts.ca.gov/documents/TribalForumoverview.pdf.

[21] N.M. Tribal-State Judicial Consortium, *Home*, https://tribalstate.nmcourts.gov/.

[22] *See* Mich. Dep't of Treasury, *Taxes – Native American*, Michigan Taxes, http://www.michigan.gov/taxes/0,4676,7-238-43513_43517---,00.html.

Arizona and Idaho, as discussed above, and New York, North Dakota, Utah and Wisconsin, all have similar programs.[23] This level of cooperation between state court and tribal court judges improves the operation of both sets of courts, and provides for mutual education about the laws, procedures, and customs of each jurisdiction.

CONCLUSION

Federal laws, policies and judicial decisions have supported the growth and development of tribal courts since 1934. Over the last several decades in particular, tribal courts have expanded in number and grown in capacity. Many tribal courts, including those of the Mississippi Band of Choctaw Indians and amici tribes, regularly hear a wide range of cases involving tribal members and nonmembers alike. These well-developed tribal courts have accessible and familiar laws and fairly adjudicate cases before them, regularly affording due process to all parties. State and federal courts that recognize tribal court judgments, whether as a matter of comity or full faith and credit, afford an additional layer of due process review. This case presents no reason for the Court to issue a decision that would strip the Mississippi Choctaw Band, much less all tribes, regardless of the quality and sophistication of their court systems, of the power to hear cases involving tort claims against nonmember defendants absent express consent. Such a decision would limit tribes' ability to ensure the welfare of their people, be out of step with federal

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[23] *See* Tribal Law & Policy Inst., *Tribal-State Court Forums: An Annotated Directory*, (2015), *available at* http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/jcip/2015TribalStateCourtConvening/Tribal-State%20court%20forum%20document%20DRAFT%20FINAL%207-2015.pdf.

laws and policies, and be based on little more than unfounded and unjustified fears of tribal courts.

The decision below should be affirmed.

Respectfully submitted,

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October 22, 2015

AMICUS CURIAE BRIEF

No. 13-1496

In the Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,
Petitioners,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONERS

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BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. is a public-policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues affecting its members, and to highlight the potential industry-wide consequences of significant pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Retailers are cornerstones of towns and cities across this country. As providers of consumer goods and services and as employers who provide jobs, retailers play a critical role in the day-to-day lives of all Americans. That role is no less critical for the Native Americans who live on tribal lands.

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[1] The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

Yet when it comes to investment and expansion, retailers face continuing uncertainty over the fundamental question of which judicial system governs their conduct on tribal lands. "The ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real practical consequence given the special nature of [Indian] tribunals, . . . which differ from traditional American courts in a number of significant respects." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring) (internal citations omitted).

RLC writes as *amicus* to urge this Court to articulate a simple, workable standard governing when nonmembers may become subject to tribal court jurisdiction: nonmember consent to such jurisdiction must be express, clear, and unequivocal, so as to eliminate uncertainty that can discourage investment.

The Fifth Circuit's permissive reading of the first exception in *Montana v. United States*, 450 U.S. 544 (1981), upends *Montana*'s strong foundational presumption against tribal civil jurisdiction over nonmembers. Indeed, the test applied by the Fifth Circuit creates such an expansive version of this "exception" that it is difficult to imagine many business disputes that would fall outside the rule.

The Fifth Circuit's approach thus ignores more than thirty years' worth of this Court's jurisprudence, which consistently emphasizes that a tribe's inherent sovereignty presumptively does not extend to regulation of nonmembers.

As summarized in *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997), *Montana* "described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions . . . ." This Court has underscored *Montana*'s general rule in every subsequent case examining tribal court jurisdiction, most recently reiterating, "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . ." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008).

In light of this strong presumption against jurisdiction, any exception "cannot be construed in a manner that would swallow the rule or severely shrink it." *Id.* at 330 (internal quotes and citations omitted). That is exactly what the Fifth Circuit did below by interpreting *Montana's* first exception so broadly that it amounts to a grant of general adjudicatory jurisdiction over any nonmember who conducts business with a tribe or its members.

RLC urges this Court to reject the Fifth Circuit's approach and adopt a simple and straightforward test for adjudicatory jurisdiction over nonmembers that is well-established elsewhere in this Court's jurisprudence: clear and unequivocal express consent. This test will limit needless litigation in both tribal and federal courts regarding which system has jurisdiction. Equally as important, this test will ease uncertainty among parties who have thus far decided to stay on the sidelines rather than

risk investment where they cannot determine which legal system governs their conduct.

ARGUMENT

The Fifth Circuit misconstrues the general presumption underlying tribal jurisdiction over nonmembers. First, the court below read into the first *Montana* exception a general adjudicative authority never recognized by this Court. And second, the court below virtually abandoned any requirement that tribal action fall within the scope of the nonmember's consensual relationship with the tribe or its members.

Both of these errors directly conflict with an unbroken line of Supreme Court case law dating from the "pathmaking" *Montana* case (and with roots back to the founding days of the Union). *See Hicks*, 533 U.S. at 358.

RLC instead recommends an easily-administered test by which consent to adjudicatory jurisdiction may be judged: the party urging jurisdiction must demonstrate that the nonmember gave clear and unequivocal express consent. This rule will permit all parties to understand which legal system will govern any disputes, and it will avoid needless expense and delay while parties engage in years of litigation in jurisdictional disputes.

I. THE COURT BELOW CREATED A TRIBAL COURT JURISDICTIONAL TEST THAT IS AN "EXCEPTION" IN NAME ONLY

A. Analysis Of Tribal Jurisdiction Over Nonmembers Must Start From The Strong Presumption Against Such Authority

All disputes involving tribal power over nonmembers must start with the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. While the two exceptions to the general rule this Court identified in *Montana* have been the primary focus of subsequent court decisions, *Montana's* broad pronouncement regarding the narrow limits on tribal authorities' jurisdiction over the activities of nonmembers remains the starting point for any such dispute.

Too often, as in the decision below, legal analysis of tribal jurisdiction treats *Montana* as little more than a summary of two methods for finding jurisdiction. That's true only in the sense that *Casablanca* is little more than a movie in which Humphrey Bogart hands Paul Henreid two plane tickets. Without an understanding of the context – the general rule from which the *Montana* exceptions are only a small subset – the significance of the exceptions cannot be properly understood.

In *Montana*, this Court firmly rooted the limited scope of tribal authority in one principle: as sovereigns, tribes are permitted general jurisdiction over their members and their territory. *Montana*,

450 U.S. at 563. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (recognizing tribes as a "separate people, with the power of regulating internal and social relations" as well as the authority to "make their own substantive law in internal matters and to enforce that law in their own forums") (citations omitted).

Through incorporation into the Union, however, tribes "have lost many of the attributes of sovereignty," including "those involving *the relations between an Indian tribe and nonmembers of the tribe*." *Montana*, 450 U.S. at 563 (internal quotations omitted) (emphasis in original). The sovereignty retained is "of a unique and *limited* character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added).

This Court has since repeatedly emphasized *Montana*'s "general presumption" limiting the scope of tribal authority. *See, e.g., Plains Commerce*, 554 U.S. at 328 ("[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . ."); *Strate*, 520 U.S. at 446 ("*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions . . . ."); *Hicks*, 433 U.S. at 359 ("Where nonmembers are concerned, the exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal* relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." (internal quotes omitted) (emphasis in

original)); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) ("We concluded that the inherent sovereignty of Indian tribes was limited to their members and their territory" (internal quotes omitted)).

Montana's general rule against jurisdiction is thus no mere preamble. This strong presumption against jurisdiction is the foundation for all analysis that is to follow.

B. The Fifth Circuit Below Reversed The Presumption Against Jurisdiction Over Nonmembers, Making Tribal Court Jurisdiction The Rule And Not The Exception

If this Court's well-established presumption against tribal jurisdiction over nonmembers is to have effect, exceptions to that presumption must be applied with restraint.

The Fifth Circuit exercised no such restraint. Instead, it transformed the first exception into a near-wholesale grant of adjudicative jurisdiction.

In *Montana*, this Court identified two narrow exceptions to the presumption against tribal jurisdiction over nonmembers. The first exception provides that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

Montana, 450 U.S. at 565.[2] In applying this exception, this Court has required a clear nexus between the tribal regulation and the nonmember defendant's consensual relation with the tribe or its members. *Plains Commerce*, 554 U.S. at 338; *Atkinson*, 532 U.S. at 656.

In the ruling below, the Fifth Circuit improperly expanded this exception in two key respects. First, the court of appeals erred when it concluded that there is little difference between regulation through private tort actions (based on a tort law system that is largely unwritten) and regulation through "precisely tailored regulations." Pet. App. at 11 (internal quotes omitted). Second, the Fifth Circuit erred when it held that so long as the plaintiff's cause of action could have been anticipated under tribal law, this Court's nexus requirement is satisfied. *Id.* at 14, n.4 (basing its nexus conclusion on its belief "that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law").

As explained below, neither extrapolation was justified, and the resulting broad pronouncement of

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[2] The second exception, governing on-reservation conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" *Montana*, 450 U.S. at 566, applies only to conduct that "imperil[s] the subsistence of the tribal community." *Plains Commerce*, 554 U.S. at 341. Respondent does not argue that the second exception applies to Petitioners' alleged conduct in this case.

tribal authority conflicts with *Montana* and this Court's subsequent decisions.

1. *Montana*'s First Exception Does Not Contemplate Regulation Through General Adjudicative Jurisdiction

By equating private tort claims with tribal regulation through "taxation [and] licensing," the Fifth Circuit turned a narrow exception to this Court's presumption against tribal jurisdiction into a plenary grant of general adjudicative jurisdiction. By its plain terms, the narrow regulatory language of this exception does not provide for any such general adjudicative jurisdiction, and "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce,* 554 U.S. a 330; *Hicks*, 533 U.S. at 358 (noting that whether or not adjudicative jurisdiction *equals* legislative jurisdiction remains an open question); *Strate*, 520 U.S. at 453. Accordingly, as confirmed in *Hicks*, the Court "has never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358 n.2.

The exception this Court outlined in *Montana* is completely silent regarding adjudicative jurisdiction and instead speaks only of regulation "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565. Plenary tribal court jurisdiction cannot reasonably be viewed as the types of "other means" intended by this exception.

Taxes and licenses are, generally speaking, reasonably narrow impositions on a nonmember's

rights, and the power over liberty or property that a tribe may exercise through these vehicles is necessarily limited. The type of general adjudicative jurisdiction prescribed by the Fifth Circuit's decision is another animal entirely. Judicial remedies are vast, including injunctive relief, declaratory relief, other equitable relief, and compensatory and punitive damages. With this wide palette, a single judicial officer possesses the tools to intrude upon a defendant's core liberty and property interests, subject only to such rights of review granted by the applicable tribal court system.

The differences between limited regulation and adjudicative jurisdiction should give pause: As this Court emphasized in *Plains Commerce*, tribal systems exist "outside the basic structure of the Constitution." 554 U.S. at 337 (internal quotes omitted). "[I]t has been understood for more than a century that the Bill of Rights and Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383 (Souter, J., concurring). The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1302, imposes some procedural safeguards, but "the guarantees are not identical, and there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clause and need not follow U.S. Supreme Court precedents jot-for-jot." *Id.* (internal citations and internal quotes omitted).

Put simply, the hallmarks and protections of the American judicial system that are guaranteed to all citizens of the United States under the Constitution

are not guaranteed in tribal court. Compounding the impact of these differences is the fact that, following final judgment in the tribal court system, a nonmember defendant has no right to a merits review of the case in federal court – not even in this Court.[3]

Thus, if, for example, a tribal court issues a ruinous punitive damages award based on impermissible considerations, such as that ruled unconstitutional in *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2006), the nonmember would have no recourse outside the tribe's own appellate system – if such a system exists for the specific tribe. Similarly, if a tribal court authorizes a tribe to confiscate a nonmember's property without just compensation, as this Court held unconstitutional in *Horne v. Dep't of*

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[3] That fact has not been lost on those advocating for expanded independence of tribal court systems. One such commentator is Matthew L.M. Fletcher, whose scholarship on tribal courts was cited with approval in n.10 on p. 20 of the Brief for the United States as *Amicus Curiae* On Petition For A Writ Of Certiorari. *See, e.g.*, Matthew L.M. Fletcher, *Resisting Federal Courts On Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973, 976, 1004, 1025 (2010) (urging "resistance to federal government control embodied in the Supreme Court's assertion of federal court supervision over tribal court civil jurisdiction," recommending that tribal courts "resist the federal judiciary's assertion of jurisdiction to determine tribal court jurisdiction, a step which might include tribal court efforts to assert civil jurisdiction over nonmembers, perhaps even in the face of a federal order to halt," and recommending that "Tribal judges, in carefully chosen instances, can and should resist such federal court decrees by simply refusing to comply.").

Agric., 135 S. Ct. 2419, 2428 (2015), the nonmember would similarly have no recourse outside the tribe's own appellate system. This inability to obtain federal court review of such drastic outcomes further demonstrates that the Fifth Circuit's expansive reading of this Court's narrow exception was erroneous. This inability also chills investment and expansion by businesses, including the *amicus* members of the retail industry, who are understandably reluctant to expose themselves to such unquantifiable risks.

Moreover, neither the taxation nor licensing referenced in *Montana* resembles anything close to the level of power tribal courts would exercise over nonmembers pursuant to the regulation contemplated by the Fifth Circuit's decision. The principle of *ejusdem generis* thus excludes civil adjudicative jurisdiction as one of the "other means" of regulation intended by the first exception. *Yates v. United States*, 135 S. Ct. 1074, 1087-88 (2015). Had this Court intended the first exception to include perhaps the most sweeping form of regulation – general civil adjudicatory authority – it would have had no reason to first list only the highly-specific and technical terms "taxation" and "licensing."

Preventing an overly-expansive view of the *Montana* exception will not leave tribes and their members without legal recourse. First, tribes always retain the authority to "exclude outsiders from entering tribal land," including those who have violated tribal law. *See Plains Commerce*, 554 U.S. at 328.

Furthermore, federal and state courts also remain available to tribes and their members seeking redress. *See Hicks*, 533 U.S. at 373 (noting the availability of "the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- or state-law rights"); *Strate*, 520 U.S. at 459 (1997) (recognizing that state courts are available for tribal member's "optional use"). And finally, as discussed below, the tribal court may seek to obtain the nonmember's clear and unequivocal express consent to jurisdiction.

2. *Montana*'s First Exception Requires A Close Nexus Between The Consensual Relationship And The Exercise Of Jurisdiction

Montana's first exception also requires a nexus between the challenged regulation and the defendant's consensual relationship with the tribal party. The Fifth Circuit dramatically magnified its expansion of this *Montana* exception by holding that the nexus element is satisfied so long as the court "suspect[s] that [the nonmember] could have easily anticipated that such a thing would be actionable under [tribal] law." Pet. App. 14, n.4. That is, the Fifth Circuit's test is reasonable foreseeability *under tribal law*, which has never been the standard for the exercise of jurisdiction under *Montana*.

This Court rejected a virtually-identical argument in *Plains Commerce*. In that case, the plaintiff argued that the respondents "could hardly have been surprised" by the exercise of tribal jurisdiction in

light of their "lengthy on-reservation commercial relationships" with the tribal member. 554 U.S. at 338. This Court rejected that argument, stating, "[A]s we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Id.* (quoting *Atkinson*, 532 U.S. at 656). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another . . . ." *Atkinson*, 532 U.S. at 656.

Plains Commerce and *Atkinson* thus teach that the scope of the nonmember consent cannot be defined by a court's hindsight suspicions about whether a nonmember "could have" anticipated that his actions might violate a tribal law – especially where such law is often unknown to the nonmember and not published by the tribe. Instead, the examination must begin and end with the nonmember's express declaration of consent. Any other test inevitably will erode *Montana*'s general rule against jurisdiction over nonmembers.

II. A PARTY INVOKING TRIBAL COURT JURISDICTION MUST PRESENT EVIDENCE OF CLEAR AND UNEQUIVOCAL EXPRESS CONSENT

With neither the first (regulatory-based) nor second (emergency-based) *Montana* exceptions providing a basis for general adjudicatory jurisdiction over nonmembers, the vast majority of tribal court actions over nonmembers must be based on consent. *Amicus* RLC urges this Court to adopt a

bright-line standard for measuring such consent, so that its members will be able to evaluate in advance the merits and risks of expanding into tribal areas.

A. Longstanding Confusion Regarding Adjudicatory Jurisdiction Highlights The Need For A Clear Articulation Of A Consent-Based Standard

Although the presumption against jurisdiction has been a mainstay of this Court's jurisprudence since at least *Montana*, confusion over the applicable standard by which any exercise of jurisdiction should be measured has persisted for almost as long. Justice Souter noted in *Hicks* that the Court's pronouncements on adjudicatory jurisdiction "have pointed in seemingly opposite directions." 533 U.S. at 376 (Souter, J., concurring).

The best evidence of the confusion surrounding this issue is the fact that this is the fourth instance in which this Court has considered tribes' civil adjudicative jurisdiction over nonmembers since *Montana* was decided in 1981. *See Plains Commerce*, 554 U.S. at 324; *Hicks*, 533 U.S. at 406; *Strate*, 520 U.S. at 442. And that does not include this Court's two related rulings regarding which court system should be permitted to first evaluate questions of tribal court jurisdiction – the issue of "tribal exhaustion." *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *National Farmers Union v. Crowe Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

In light of this history and the lingering confusion demonstrated by the court of appeals below, *amicus*

urges this Court to articulate a simple, bright-line test for evaluating jurisdiction outside the narrow confines of the *Montana* exceptions. The party invoking tribal court jurisdiction must be required to establish that the nonmember gave *clear and unequivocal express consent* to the exercise of jurisdiction.

Anything less, such as a system that infers consent from *post-hoc* examinations of parties' conduct, is incompatible with the general presumption that has been the foundation of this Court's cases from *Montana* to *Plains Commerce.* Moreover, *amicus* emphasizes that a hindsight-based approach discourages investment and expansion because businesses are wary of exposing themselves to risks where such fundamental factors as the applicable legal system cannot be identified until after a dispute has arisen.

B. The "Clear and Unequivocal" Test For Consent Has A Long History In Indian Law

In articulating a test for evaluating nonmember consent, this Court need not create a new test from scratch. Doing so only risks further disputes in the courts below regarding the contours and application of that test.

Rather, the better course is to adopt an existing standard with established interpretive jurisprudence in this Court. In so doing, this Court will short-circuit years of future debate over the meaning of the words of the new standard.

The requirement of a clear and unequivocal expression of consent already exists in Indian law, in the context of sovereign immunity waivers.4 As this Court held in 1978 in *Santa Clara Pueblo*, a tribe subjects itself to suit in federal court only upon a waiver that "cannot be implied but must be unequivocally expressed." 463 U.S. at 57 (internal quotes omitted). More recently, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* emphasized that the consent to suit must be "clear," 498 U.S. 505, 509 (1991), and this standard was echoed again in *C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

This simple and workable rule should be adopted here. Native American tribes are familiar with this standard, and existing case law will provide an interpretive guide for future disputes.

C. A Standard Requiring Clear And Unequivocal Express Consent Will Limit Needless Jurisdictional Litigation In Tribal Court

Adopting the requirement of clear and unequivocal consent will help parties avoid disputes over the application of tribal exhaustion.

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[4] In making this observation, RLC does not mean to suggest in any way that nonmembers in a tribal system are entitled to the same deference or comity as are sovereign tribes in the federal and state systems. They are not. *Amicus* only calls attention to the existence and successful application of this consent-based standard within Indian law.

Although tribal exhaustion was not at issue in the court below, it is of concern to *amicus*. Under *National Farmers Union*, the question of whether a tribe can compel a nonmember to submit to civil jurisdiction of a tribal court presents questions of federal law under 28 U.S.C. § 1331. 471 U.S. at 952. Nevertheless, under principles of comity, the federal court faced with a motion to enjoin a pending tribal court action will ordinarily stay its hand until the parties have litigated the jurisdiction issues through appeal in tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 16-17; *National Farmers Union*, 471 U.S. at 856-57.

Tribal exhaustion is frequently a time-consuming and expensive process. For example, in this case, when Dollar General was first sued in tribal court in January 2005, it immediately raised a jurisdictional challenge. Pet. App. 3. Dollar General did not fully exhaust the jurisdictional challenge until three years later – February 5, 2008. Pet. App. 75-91. Only then was it in a position to begin a *National Farmers Union* action in the Southern District of Mississippi to review the tribal court's assertion of jurisdiction.

Tribal exhaustion is excused, however, where the tribal court's lack of jurisdiction is clear. *Hicks*, 533 U.S. at 369. Where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule" and exhaustion "would "serve no purpose other than delay," the exhaustion requirement "must give way." *Strate*, 520 U.S. at 459-60 and n.14.

Amicus has no quarrel with the concept of tribal exhaustion when the issue being litigated is a close one, and the proposed standard does not harm the doctrine of tribal exhaustion in such cases. Instead, the proposed standard will simply reduce, dramatically, the number of close questions requiring exhaustion.

A rule that nonmember consent to tribal court jurisdiction must be clear and unequivocal will thus help both tribes and parties avoid the quagmire of years of litigation over the nature and scope of tribal court jurisdiction. With a clear understanding of "where tribal jurisdiction begins and ends," *Hicks*, 533 U.S. at 383 (Souter, J., concurring) both tribes and nonmembers, such as the retail industry members whose businesses sustain small towns throughout this country, will be free to proceed with confidence about which judicial system will provide relief in the event of a dispute.

CONCLUSION

Amicus supports Petitioner's request that this Court clarify the standards for permitting tribal court jurisdiction over nonmembers. Under *Montana* and its progeny, such jurisdiction should be the rare exception and not the default. With a standard that requires clear and unequivocal express consent, businesses will have a framework on which to base their investment decisions. In the absence of such a clear standard, RLC fears the uncertainty will only persist, to the detriment of business and to the detriment of all tribal parties.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 8, 2015

AMICUS CURIAE BRIEF

No. 13-1496

In The

Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,

Petitioners,

v.

MISSISSIPPI BAND OF
CHOCTAW INDIANS, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF AMICUS CURIAE OF THE SOUTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The South Dakota Bankers Association ("SDBA")[1] is a voluntary association of banks doing business in South Dakota. It has 86 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota's numerous Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the "*Montana*[2] exceptions" to the general rule that Indian tribes do not have regulatory or civil-adjudication over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.

SUMMARY OF ARGUMENT

Uncertainty as to the rules of the "economic game" leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations. The reluctance is understandable given the "special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S.

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[1] The parties have consented to the filing of this brief, and their consent forms have been filed with the court. No counsel for either party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparations or submission of this brief. No person other than amicus curiae SDBA, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Montana v. United States*, 450 U.S. 544 (1981).

676, 693 (1990). The decision of the Fifth Circuit Court of Appeals in this matter eliminates important limitations to jurisdiction set by this Court in *Montana*. In a legal landscape already difficult for outsiders to navigate, the decision below injects greater uncertainty as to the rules of the game and increases the risks of doing business with tribes or tribal members who reside in Indian country. The net result of this uncertainty and risk will be further economic hardship for those living on and near Indian reservations.

ARGUMENT

In its amicus brief to this Court in *Plains Commerce*, the SDBA noted that lack of predictability as to future events is detrimental to the economy in general and to credit markets in particular. Brief for American Bankers Association and South Dakota Bankers Association as Amici Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008) (No. 07-411). At that time, SDBA asserted that uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can result in similarly injurious economic consequences. *Id.* at 2-3. That assertion remains true today. A primary source of reluctance on the part of non-Indian businesses to doing business on reservations is difficulty in determining and understanding "the rules of the game." The Fifth Circuit's decision in this matter exacerbates the uncertainties and risks of

doing business in Indian country by expanding tribal court jurisdiction to include the adjudication of tort claims against non-Indian defendants for punitive damages. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 418-19 (5th Cir. 2014).

The decision below incorrectly expands jurisdiction beyond what is "necessary to protect tribal self-government [and] to control internal relations" and exposes non-Indian businesses and individuals to much greater and almost unlimited risk. *See Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 332 (2008).

The proposition that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business in Indian country is well-recognized. As Justice Souter noted in his concurrence in *Nevada v. Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences given '[t]he special nature of [Indian] tribunals . . . '." 533 U.S. 353, 383 (2001) (quoting *Duro*, 495 U.S. at 693) (Souter, J., concurring). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus can never have a voice in changing procedural rules, substantive law

or other matters involving Indian tribunals with which they disagree. *See Duro*, 495 U.S. at 679.

In *Hicks*, Justice Souter noted the unique challenges facing an outsider attempting to grasp the applicable law in tribal court:

> [t]ribal law is still frequently unwritten, being based instead on the 'values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another' . . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.

533 U.S. at 384 (Souter, J., concurring). Interpreted in conjunction with tribal "customs, traditions, and practices," even readily-available written tribal ordinances and resolutions may take on a wholly different meaning from comparable state or federal statutes.

This case involves an area of law that is even more difficult for "an outsider to sort out" – that body of law not set forth in statute or written tribal regulation. Even where precedent exists, much of that precedent may be inaccessible from a practical perspective. Unlike the decisions of the highest state courts, many tribal court decisions are not available

to the public in any indexed or searchable format.[3] Most are not available through the leading legal research publishers. Accordingly, the ability for an "outsider" to use and rely on tribal precedent to guide its actions and determine risks is greatly limited by the ability to find precedent.

On top of these challenges, non-Indian defendants are also often confronted with tribal judicial systems that are underfunded, lack adequately-trained staff, and lack judicial independence. In this regard, the Mississippi Band of Choctaw Indians, with a robust economy and well-developed court system,[4] is not representative of the governmental

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[3] Efforts by third parties to compile tribal court decisions to enhance accessibility are admirable, but often fall short. For example, a compilation of Rosebud Sioux Tribal Court Decisions is maintained by the Sicangu Oyate Bar Association on that organization's website. This is a valuable resource to those wading into law in the Rosebud Courts. Yet, at the time of this writing, the list of decisions had not been updated since 2011. *See* Sicangu Oyate Bar Association, Appellate Decisions, http://sicanguoyatebar.org/appellate-decisions/ (last visited Sept. 1, 2015).

[4] The Harvard Project on American Indian Economic Development named the Mississippi Band of Choctaw Indians as a 2005 Honoring Nations honoree, recognizing its "vibrant economy" and the development of its judiciary, which includes the Indigenous Law Library, which interviews tribal elders to archive records of traditional values to be referenced and applied within the legal system. The Harvard Project on American Indian Economic Development, *Honoring Nations: 2005 Honoree*, 1 (2006), *available at* https://nnidatabase.org/db/attachments/text/honoring_nations/2005_HN_Choctaw_tribal_court_system.pdf.

and judicial realities in other parts of Indian Country. Chief Judge Ralph R. Erickson, from the District of North Dakota, offers a description more indicative of tribal courts in the Upper Midwest, when he states that tribal courts are "overwhelmed by problems rising out of a lack of adequate funding, a lack of adequately trained personnel, and a lack of true judicial independence."[6] He goes on:

> To describe the overall state of the facilities available to the tribal courts as wanting is an understatement. The Court recognizes that many of the tribes have taken herculean efforts to make do with judicial resources that state and federal courts would deem create a constitutional crisis. In short, many

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[6] Recent decisions from South Dakota offer glimpses into the types of political struggles that embroil tribal judiciaries where there exists inadequate judicial independence. *See, e.g.*, *Wright v. Langdeau*, 2015 U.S. Dist. LEXIS 76307, *2 (D.S.D. June 10, 2015) ("In December of 2014, a tribal council meeting was held wherein Plaintiffs were attempting to ascertain the whereabouts of roughly $24 million in federal funding and how it could be that the current chief tribal judge was seated after allegedly being defeated in the election process."); *Lee v. Her Many Horses*, 2014 U.S. Dist. LEXIS 42626, *2 (D.S.D. Mar. 30, 2014) ("The amended complaint seeks a writ of mandamus against all the defendants and includes the following request for relief: (1) protection for Mr. Lee, as Chief Judge of the Oglala Sioux Tribal Court, from removal by the Oglala Sioux Tribe ("OST") Tribal Council; (2) protection for Rhonda Two Eagles, as OST Tribal Secretary, from removal by the OST Tribal Council; (3) protection for Mr. Bielecki from removal from the Pine Ridge Indian Reservation by the OST Tribal Council; (4) protection of the Treaty Council Members from arbitrary arrest. . . .").

> tribal courts are so short of resources and personnel that they constitute a national embarrassment.

United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1072-73 (D.N.D. 2009). Although jurisdiction may not hinge on the transparency, accessibility, or effective functioning of the tribal legal system, this is the backdrop of uncertainties already facing outsiders, to which the decision below adds further unpredictability and greater risk.

The Fifth Circuit's decision removes a powerful limitation on the extent of tribal jurisdiction over non-Indians set forth in *Montana*: that tribes may only regulate non-Indian conduct "*to the extent necessary*" to control internal relations. *Plains Commerce*, 554 U.S. at 332. The decision below concedes that "the tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members." *Dolgencorp*, 732 F.3d at 417. Yet, then the court then sets forth a standard under which tribal courts may impose theoretically unlimited punishment upon a non-Indian defendant in tort law, so long as there exists *some* nexus between the activity or person regulated and a consensual relationship with the tribe or its members. *Id.* at 415-17. The decision expands the regulatory power of the tribe, with regard to who and what fall under the tribal court's jurisdiction, and perhaps more importantly, *how* the tribe may impose punishment as a method of control over

those persons and activities. The decision renders the important limitations of *Montana* meaningless.

Where and against whom jurisdiction lies are important questions as banks and other entities assess the costs and benefits of doing business on a reservation. The nexus described by the Fifth Circuit needed to determine these questions sets forth a broad and ill-defined test for the assumption of tribal jurisdiction. *Dolgencorp*, 732 F.3d at 415-17. Under the lower court decision, the vague standard of foreseeability is used to determine whether a non-Indian defendant may be regulated by a tribe. The court opines that "a business operating on Indian land in a reservation is unlikely to be surprised by the possibility of being subjected to tribal law in tribal court." *Id.* at 415, n. 4. The test offers little guidance to non-Indians considering doing business with reservation Indians or tribes as to the extent that one business activity may trigger all forms of tribal authority over all persons or activities in any way related to that business on the reservation. For example, many tribes require non-Indian businesses to be licensed to operate on their reservation. Could applying for a business license make it "foreseeable" that the non-Indian business could be brought before tribal court for *any* act?[6] Could a tribal court determine that it

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[6] The Supreme Court of the Mississippi Band of Choctaw seems to indicate that the answer to this question, under its interpretation of *Montana*, is a certain "yes," regardless of the act which gave rise to the dispute – so long as an act is committed on Indian land. *Doe v. Dollar General Corp.*, No. CV-02-05

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has jurisdiction over an employer for claims arising from of its employee's off-duty tortious acts on the reservation, if the employee would not have been on the reservation but for the business? Although such a claim would not be likely in state court, the foreseeability of the use of such an action under tribal law, incorporating traditions and customs, is difficult to determine.

Equally important is *how* the tribe exerts power in its attempt to "regulate" those entities and activities. "*Montana* expressly limits its first exception to the activities of nonmembers, allowing these to be regulated *to the extent necessary* to protect tribal self-government [and] to control internal relations." *Plains Commerce*, 554 U.S. at 332 (internal citations and quotations omitted) (emphasis added). The phrase "to the extent necessary" should be interpreted to place limits on the type and degree of "regulation" – or in this case, punishment – imposed upon non-Indians. Jurisdiction over claims for punitive damages, as the form of regulation presented in this case, in essence allows a tribal court to impose *any* degree of financial punishment on a non-Indian defendant. Punitive damages may be, and probably are, unchecked by tribal statutory limitation, and are

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(S. Ct. of Miss. Band of Choctaw Indians 2008) ("It strains credulity to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.")

not guided by Constitutional considerations applied in state and federal tribunals. *Compare State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412, (2003) ("Thus, while states enjoy considerable discretion in deducing when punitive damages are warranted, each award of punitive damages must, under the due process clause, comport with the principles set forth in *BMW of N. Am. v. Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589[.]") *with Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("[T]ribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Simply put, the extent of power exercised by the tribe in the form of financial punishment imposed on the non-Indian is unlimited. Despite the Fifth Circuit's note that "the goal of promoting tribal self-government" is "embodied in numerous federal statutes[,]" Congress has never approved of an extension of civil jurisdiction that would override this Court's instruction that the regulation and jurisdiction over non-Indians should only extend as far as is necessary to control internal relations or protect self-government.[7] This

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[7] Congress has, in very limited areas and through very specific means, chosen to exercise its power to explicitly extend the reach of tribal court jurisdiction over non-members. For example, under the Violence Against Women Act, some tribal courts are now authorized to exercise criminal jurisdiction over some non-member defendants. *See* 25 U.S.C. § 1304 (conferring special domestic violence jurisdiction over non-Indians). In authorizing such jurisdiction, however, Congress also set forth detailed due-process protections, such as requiring that criminal

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Court should uphold the limitations in *Montana* and reject the use of such unlimited power to punish assumed by the tribe in this case.

Business needs certainty to flourish. "Where justice is uncertain, delayed, or denied entirely, it is completely predictable that economic stability will be difficult to obtain or maintain." *Cavanaugh*, 680 F. Supp. 2d at 1072. "The plain truth is that business owners will not locate businesses in places where the communities lack general order or where predictability of results in contractual or civil suits does not exist." *Id.* at 1072-73. For banks, the need for stability and predictability is especially important. Risk and uncertainty to banks really means risk and uncertainty to the depositors who have entrusted their money to the banks' safekeeping. If banks fear that making a loan or otherwise conducting business on a reservation may subject the depositors' money to great risk, or that the degree of risk is too difficult to calculate, those banks are less likely to extend credit and engage in business on reservations.

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laws and rules be made publicly available, ensuring the assistance of counsel, and requiring a "cross section of the community" jury. *Id.* Notably, even where Congress extended this criminal jurisdiction, it refrained from extending civil jurisdiction in related, and perhaps necessary areas. For example, although VAWA requires a "cross section" jury, it grants tribal courts no civil authority over non-Indians to hold non-Indian community members in contempt for failure to appear for tribal jury duty.

The need for more trade with, and economic activity on, Indian reservations cannot be understated. Since the decision in *Plains Commerce*, the economic conditions for reservation Indians, especially those in South Dakota, continue to be grim. As reflected by reports on the 2010 Census, reservation communities continue to top the list of those in deepest poverty:

> Of the five counties with poverty rates greater than 39 percent, four contain or are contained within American Indian reservations: Sioux County, N.D., which is contained within the Standing Rock Indian Reservation; Buffalo County, S.D., which contains the Crow Creek Indian Reservation; Shannon County, S.D., which is contained within the Pine Ridge Indian Reservation; and Todd County, S.D., which is contained within the Rosebud Indian Reservation.

U.S. Census Bureau, New Estimates Provide Detailed Look at Every Community in the United States, *available at* https://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn90.html. "[A]t recent rates of economic growth it would take decades for per capita income in Indian Country to converge with that in the rest of the US[.]"[8] Indian Country does not need greater barriers

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[8] Randall K.Q. Akee & Jonathan B. Taylor, Taylor Policy Group, Social and Economic Change on American Reservations: A Databook of the US Censuses and the American Community Survey 1990-2010 15 (May 15, 2014), *available at* http://static1.

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to investment by, and trade with, off-reservation businesses.

The SDBA respectfully submits that greater certainty as to the limits of tribal jurisdiction, including limitations on tribal courts' ability to impose punitive damages on non-Indians, will encourage investment and economic activity on reservation communities. The greater uncertainty and increased risks created by the Fifth Circuit's misapplication of *Montana* will have detrimental effect on that economic potential. It is imperative that this Court ask if a tribal court wielding the powerful tool of unlimited punitive damages against a non-Indian defendant is "necessary" under *Montana* to control internal relations of the tribe under circumstances such as those presented in this case. The SDBA asserts that the exercise of such jurisdiction is not necessary or appropriate under *Montana*, and that upholding the decision below will have significant economic consequences for reservation economies across the United States.

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CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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